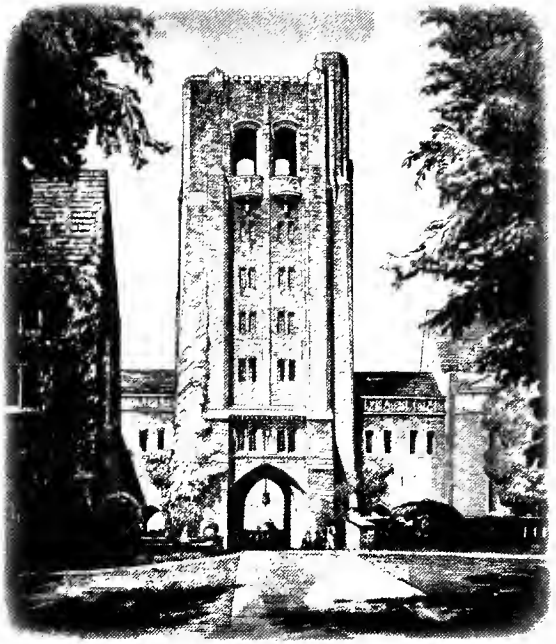

Equity Procedure

Embodying the Principles of Pleading and Practice Applicable to Courts of Equity, and Containing Many Precedents of General, Practical Utility

Designed Especially to Meet the Demands of Practice in Virginia and West Virginia, and for General Use in Other States, Being a Thorough Revision of Hogg's Equity Procedure

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CHAPTER XXXIII

INFANTS AND INSANE PERSONS

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§ 843. The protection of infants and insane persons by courts of equity.

Courts of equity, as in the exercise of their jurisdiction in other cases, deal not only with the property rights and interests of infants and insane persons, but also act in some instances for the protection of their persons.[1] But, though this is true, in nearly all the instances in the more modern practice of courts of equity, the management, control and disposition of their property rights and interests have been involved; so that what is said here will relate to that matter, and more especially as to the lease or sale of the property of such persons by the courts under the provisions of the various statutes regulating this matter.[2]

§ 844. The sale of property belonging to persons under disability.

In the *Virginias,* it is provided by statute that if the guardian of any minor, or the committee of any insane person, think that the interests of the ward or insane person will be promoted by a sale of his estate, or if the trustee of any estate, or any person interested in any estate in trust, think that the interest of those by whom the estate is held will be promoted by a sale thereof, such sale shall be made, if it appear proper to do so, upon bill filed in the circuit court[3] of the county in which the estate proposed to be sold or some part thereof may

[1] Adams, Equity (8th Ed.), 278, 281, note.

Such court has a general supervisory power over the persons and estates of infants; and when any part of an infant's estate is in litigation there, it is under the immediate guardianship and protection of the court. Westbrook v. Comstock, Walk. Ch. (Mich.) 314; People v. Wilcox, 22 Barb. (N. Y.) 178. Where an infant under twelve years of age was married, and immediately thereafter declared her dissent to the marriage, upon application to chancery by her next friend, she was declared a ward of the court, and all conversation, intercourse, or correspondence between her and the defendant to whom she had been married was forbidden under pain of contempt. Aymer v. Roff, 3 Johns. Ch. (N. Y.) 49.

[2] Hinchman v. Ballard, 7 W. Va. 152.

[3] In *Virginia*, the circuit court or corporation court.

be.[4] And in *West Virginia,* as we have stated,[5] there may be a sale of the estate of an infant or insane person in a summary proceeding by petition to the circuit court of the county wherein the estate or some part thereof may be.[6]

§ 845. As to the leasing or incumbering of the estate of persons under disability.

In *West Virginia,* and also under the later statute in *Virginia,* the estates of infants and insane persons, and estates in trust, may be leased and encumbered by trust, upon bill in equity in like manner as a sale thereof may be made;[7] and the same things may be done as to such estates upon petition to the circuit court by summary proceedings.[8] And in *Virginia,* there may be in like manner an exchange of real estate for other real estate upon bill in equity filed for such purpose.[9]

§ 846. As to the renewal of leases on behalf of persons under disability.

It is expressly provided by statute in the *Virginias* that where an infant, insane person, or married woman (if the property be not her separate estate), is entitled to or bound to renew any lease, any person on his or her behalf, or any person interested, may apply by petition or motion in a summary way, to the circuit court of the county in which the land leased or some part thereof may lie, and by the order of said court, any person appointed by it may, from time to time, surrender or accept a surrender of such lease, or take or make a new lease of the same premises for such term, and with such provisions as the court shall direct. Such reasonable sums as may be incurred to renew any such lease, shall, with interest thereon, be paid out of the profits of the leasehold premises and be a charge thereon until such payment.[10]

[4] W. Va. Code, 1913, c. 83, § 2; Va. Code, 1904, § 2616.

[5] *Ante,* § 253.

[6] W. Va. Code, 1913, c. 83, § 12.

[7] W. Va. Code, 1913, c. 83, § 2; Va. Code, 1904, § 2616.

[8] *Ante,* § 253; W. Va. Code, 1913, c. 83, § 12.

[9] Va. Code, 1904, § 2616.

[10] Va. Code, 1904, § 2615; W. Va. Code, 1913, c. 83, § 1.

§ 847. Suits by infants and insane persons to set aside conveyances and transfers of property.

Following strictly the plan of this treatise, the consideration of this matter belongs to another part thereof.[11] Ordinarily, as we have seen,[12] he who asks equity must do equity.[13] That is, if a party would relieve himself of the consequences of an act resulting from fraud or mistake, or other unconscionable transaction, he must aver in his bill a readiness and ability to place the defendant *in statu quo*, in order to obtain the relief which he seeks.[14] But there is an exception to this rule in the case of persons under the disability of infancy or insanity.[15] So that when an insane person or his estate is concerned in the matter of setting aside a conveyance or rescinding a contract, where the opposite party knew of the disability, no restitution of the consideration is required and, of course, no averment of an ability or readiness to refund what has been received by such insane person need be made in the bill.[16] If suit be brought to avoid a conveyance or other transaction of an infant, no restitution is required if the infant has parted with the consideration; but if not, restitution must be made or the bill can not be sustained.[17]

§ 848. Who may sell, lease, or incumber estate of infants and insane persons.

While the statute authorizing a sale, lease or mortgage of the estate of an infant or insane person is remedial and is there-

[11] *Ante*, c. III.

[12] *Ante*, § 126.

[13] Hogg, Eq. Princ., § 60.

[14] *Idem*.

[15] *Idem*.

[16] Physio-Med. College v. Wilkinson, 108 Ind. 314, 9 N. E. 167; Northwestern,, etc., Co. v. Blankenship, 94 Ind. 535, 48 Am. Rep. 185; Crawford v. Scovell, 94 Pa. St. 48, 39 Am. Rep. 768; Lincoln v. Buckmaster, 32 Vt. 652; Henry v. Fine, 23 Ark. 417.

The authorities are about equally divided as to whether the insane person must make restitution when the opposite party was ignorant of his incapacity and acted in good faith. See 22 Cyc., 1175-1176, and cases cited.

[17] See extended note to § 939, form No. 86.

fore construed liberally,[18] still it will not be extended by construction so as to permit any person else to come into a court of equity and make sale of such estate than the persons mentioned in the statute; namely, the guardian of an infant, committee of insane person, the trustee of, or a person interested in, an estate held in trust.[19] Thus, a widow can not merely, in right of her dower, file a bill to sell infants' lands, and get money from its sale in lieu of dower in kind. A decree of sale in such a case is absolutely void.[20] Nor, as we have seen, can a ward maintain such a bill in his own name by his next friend.[21] And the only way in which these proper parties may sell, lease or mortgage such an estate is in the manner prescribed by the statute.[22]

§ 849. The necessary parties to a proceeding to sell, lease or encumber the estate of persons under disability.

The statute authorizing a sale, lease or encumbrance of the estate of infants and other persons specifically mentioned therein expressly provides that the infant or insane person, or the beneficiaries in the trust (when not plaintiffs), and all others

[18] Vaughan v. Jones, 23 Gratt. (Va.) at p. 456; Troth v. Robertson, 78 Va. 46; Brenham v. Smith, 120 Va. 30, 90 S. E. 657; Rhea v. Shields, 103 Va. 305, 49 S. E. 70; French v. Pocahontas Coal & Coke Co., 104 S. E. 554 (W. Va. 1920).

As this statute is construed liberally, the word "estate" is held to be used in its most extensive sense, and as meaning the property, or thing, given by the deed or will, and not merely the interest therein; so as to promote the policy of the legislature, which was designed to remove those fetters upon alienation which contingent limitations more or less tend to fasten. Troth v. Robertson, *supra*.

[19] Hoback v. Miller, 44 W. Va. 635, 29 S. E. 1014; Wheeler v. Thomas, 116 Va. 259, 81 S. E. 51; Lake v. Hope, 116 Va. 687, 82 S. E. 738; Brenham v. Smith, 120 Va. 30, 90 S. E. 657.

[20] Hoback v. Miller, 44 W. Va. 635, 29 S. E. 1014; Conrad v. Crouch, 68 W. Va. 378, 69 S. E. 888.

[21] *Ante*, § 68.

[22] Wilson v. Youst, 43 W. Va. 826, 28 S. E. 781; South Penn Oil Co. v. McIntyre, 44 W. Va. 296, 28 S. E. 922; Pierce v. Trigg, 10 Leigh (Va.) 406; Faulkner v. Davis, 18 Gratt. (Va.) 662 *et seq.*, 98 Am. Dec. 698; Haskell v. Sutton, 53 W. Va. 206, 44 S. E. 533. See cases cited in note 19, *supra*.

interested, shall be made defendants to the proceeding.[23] And it is further provided by the *Virginia* statute that where there is an infant or insane defendant, all those who would be his heirs or distributees, if he were dead, shall also be made parties.[24] The only question that can arise under this statute is as to the persons who are "interested" within the meaning of that word as used in the law. An examination of the decisions made under and construing this statute and others of similar import shows that the same meaning is attached to this word which is given to it in determining who are necessary parties to an ordinary suit in equity.[25] Thus, under this statute, in a proceeding by a committee of an insane person to sell the oil and gas underlying a tract of land, the cotenants of such person are not necessary or proper parties to such proceeding.[26] In Cooper v. Hepburn,[27] "H. devises real estate to M. during his natural life, and to his children if he should leave lawful issue; if not, then at his decease to H.'s grandchildren. At the death of H., M. is not married, but he afterwards marries and has lawful children. Upon the birth of the first child of M., the remainder was vested in the child, subject to open and let in the afterborn children as they severally came into being; and the remainder in favor of the grandchildren was defeated. And therefore the grandchildren were not necessary parties to a suit by the guardian of M.'s children for a sale of the real estate."[28]

§ 850. The bill or petition in a proceeding to sell, lease or encumber the estate of persons under disability.

In the *Virginias,* the estate of persons under disability may be sold on bill in equity, and in *Virginia* in like manner the

[23] W. Va. Code, 1913, c. 83, § 2; Va. Code, 1904, § 2616. The presence of necessary parties is jurisdictional. Parker v. Stephenson, 127 Va. 431, 104 S. E. 39.

[24] Va. Code, 1904, § 2616; Parker v. Stephenson, 127 Va. 431, 104 S. E. 39.

[25] Cooper v. Hepburn, 15 Gratt. (Va.) 551; Faulkner v. Davis, 18 Gratt. (Va.) at p. 682, 98 Am. Dec. 698; Quesenberry v. Barbour, 31 Gratt. (Va.) 491; Fritsch v. Klausing, 11 Ky. Law Rep. 788, 13 S. W. 241; South Penn Oil Co. v. McIntyre, 44 W. Va. 296, 28 S. E. 922.

[26] South Penn Oil Co. v. McIntyre, 44 W. Va. 296, 28 S. E. 922.

[27] 15 Gratt. (Va.) 551.

[28] See Faulkner v. Davis, 18 Gratt. (Va.) 683, *et seq.; ante,* § 100.

exchange of real estate for other real estate may be made.[29] In the same manner, such estate may be leased or encumbered in both states.[30] The bill, when filed for any of the purposes here authorized, must plainly state all the estate, real or personal, belonging to the infant or insane person, or held in trust, and all the facts calculated to show the propriety of the sale, exchange or other disposition of the estate;[31] and it must be verified by the oath of the plaintiff.[32] The filing of the bill, or petition if the proceeding be in a summary way, as it may be in *West Virginia,* is essential to the jurisdiction of the court in such a case,[33] and there must be an averment of every fact necessary to confer jurisdiction for the object or purpose for which the proceeding is instituted.[34] The character or capacity in which the plaintiff brings the bill should be alleged,[35] and it is usual to designate the parties in interest so as to show that all necessary parties are before the court.[36] The description of the property with reference to which the bill or petition is filed should be such as to enable the same to be identified.[37] There should also be alleged in the bill or petition the infant's or insane person's interest in the estate,[38] the condition there-

[29] W. Va. Code, 1913, c. 83, § 2; Va. Code, 1904, § 2616.

[30] See same citations.

[31] *Idem;* Wheeler v. Thomas, 116 Va. 259, 268-269, 81 S. E. 51. See Parker v. Stephenson, 127 Va. 431, 104 S. E. 39.

[32] *Idem;* Brenham v. Smith, 120 Va. 30, 90 S. E. 657.

[33] Tracy v. Roberts, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394; Fitch v. Miller, 20 Cal. 352; Richardson v. Butler, 82 Cal. 174, 23 Pac. 9, 16 Am. St. Rep. 101.

[34] Fitch v. Miller, 20 Cal. 352; Smith v. Biscailuz, 83 Cal. 346, 21 Pac. 15, 23 *idem* 314; Wilson v. Holt, 83 Ala. 528, 3 So. 321, 3 Am. St. Rep. 768; Loyd v. Malone, 23 Ill. 43, 76 Am. Dec. 179; Wheeler v. Thomas, 116 Va. 259, 268-269, 81 S. E. 51; Brenham v. Smith, 120 Va. 30, 90 S. E. 657; Parker v. Stephenson, 127 Va. 431, 104 S. E. 39.

[35] Cooper v. Hepburn, 15 Gratt. (Va.) 551.

[36] Lancaster v. Barton, 92 Va. 615, 24 S. E. 251; Erwin v. Garner, 108 Ind. 488, 9 N. E. 417; Byan v. Manning, 6 Jones L. (51 N. C.) 334; Wheeler v. Thomas, 116 Va. 259, 268-269, 81 S. E. 51.

[37] Doe v. Jackson, 51 Ala. 514; Gilchrist v. Shackelford, 72 Ala. 7; Scarf v. Aldrich, 97 Cal. 360, 32 Pac. 324, 33 Am. St. Rep. 190; Wilson v. Hastings, 66 Cal. 243, 5 Pac. 217; Huberman v. Evans, 46 Neb. 784, 65 N. W. 1045.

[38] Fitch v. Miller, 20 Cal. 352; Worthington v. Duncan, 41 Ind. 515.

of,[39] and the facts showing the propriety of making sale.[40] The bill, or petition, as the case may be, should also state that, in the opinion of the plaintiff, the interest of the ward or insane person will be promoted by a sale, lease, or incumbrance of the estate, as the case may be.[41]

§ 851. What property of persons under disability may be sold under the statute.

The language of the statute as to the property that may be sold is "estates, or estate in which he [the minor or insane person] is interested with others, infants or adults; * * *, and whether the estate of the minor or insane person, or any of the persons interested, be absolute or limited, and whether there be or be not limited thereon any other estate, vested or contingent." This statute comprehends all classes of property without reference to the degree of interest.[42] Thus, under it an estate in remainder and property or estate held under an executory devise may be sold.[43] Petroleum oil and gas underlying the surface of land constitute a part of the realty, and may be sold under this statute when held by any of the class of persons mentioned in such statute.[44] And under the law authorizing the sale of the lands of infants, the power of sale of lands devised by will may be exercised by a court of equity, although it may appear from the will that it was the testator's

[39] Fitch v. Miller, 20 Cal. 352; Smith v. Biscailuz, 83 Cal. 346, 21 Pac. 15, 23 *idem* 314.

[40] *Ex parte* Jewett, 16 Ala. 410; Fitch v. Miller, 20 Cal. 352; Bunce v. Bunce, 59 Ia. 533, 13 N. W. 705; Fowler v. Lewis, 36 W. Va. 112, 14 S. E. 447; Wheeler v. Thomas, 116 Va. 259, 81 S. E. 51.

[41] W. Va. Code, 1913, c. 83, § 2; Va. Code, 1904, § 2616; McKee v. Hann, 9 Dana (Ky.) 526; Vowles v. Buckman, 6 Dana (Ky.) 466; Greenbaum v. Greenbaum, 81 Ill. 367.

[42] Faulkner v. Davis, 18 Gratt. (Va.) 668, 98 Am. Dec. 698; Talley v. Starke, 6 Gratt. (Va.) 339; Wilson v. Youst, 43 W. Va. 826, 28 S. E. 781; South Penn Oil Co. v. McIntyre, 44 W. Va. 296, 28 S. E. 922.

[43] Faulkner v. Davis, 18 Gratt. (Va.) 668; Talley v. Starke, 6 Gratt. (Va.) 339.

[44] Wilson v. Youst, 43 W. Va. 826, 28 S. E. 781; South Penn Oil Co. v. McIntyre, 44 W. Va. 296, 28 S. E. 922.

wish and intention, at the time of making the will, that the land should not be sold; provided, the sale thereof is not absolutely or expressly prohibited by the will.[45]

§ 852. As to the necessity for a guardian ad litem in a suit to sell an infant's or insane person's lands.

In a suit or proceeding to sell the estate of an infant or insane person, as in all other cases in which an infant is a defendant,[46] there must be a guardian *ad litem* appointed to such infant or insane person[47] who, as well as the infant (if over fourteen years of age), shall answer the bill on oath in proper person.[48] And if a decree be entered in a suit to sell the lands of infants directing a sale of such lands in the absence of the appointment of such guardian *ad litem* and an answer filed by him, such decree will be reversed; and if the property has been sold, the title of the purchaser will fall upon the reversal of such decree of sale.[49] The answer must be actually filed. One found among the papers of the cause without an order filing it is not sufficient.[50] It is provided by statute that no deposition shall be read in the suit against any infant or insane party, except by leave of the court, unless it be taken in the presence of the guardian *ad litem* or upon interrogatories agreed upon by him.[51]

[45] Hogg, Eq. Princ., § 124, p. 208, citing Talley v. Starke, 6 Gratt. (Va.) 339, 346, 347; Gavin v. Curtin, 171 Ill. 640, 40 L. R. A. 776.

[46] *Ante*, § 425.

[47] W. Va. Code, 1913, c. 83, § 3; Va. Code, 1904, § 2618; Hull v. Hull, 26 W. Va. 1; Talley v. Starke, 6 Gratt. (Va.) 339; Wheeler v. Thomas, 116 Va. 259, 268-269, 81 S. E. 51; Eakin v. Hawkins, 52 W. Va. 124, 43 S. E. 211.

[48] See same citations.

[49] Hull v. Hull, 26 W. Va. 1; Ewing v. Ferguson, 33 Gratt. (Va.) 548.

"Failure to appoint a guardian *ad litem* for an infant defendant, who has been duly served with process, is reversible, but not jurisdictional error, and renders the decree pronounced against such infant voidable but not absolutely void." Linn v. Collins, 77 W. Va. 592, 87 S. E. 934.

Hence, it can not be collaterally impeached. *Idem*. But see Brenham v. Smith, 120 Va. 30, 90 S. E. 657.

[50] Ewing v. Ferguson, 33 Gratt. (Va.) 548.

[51] W. Va. Code, 1913, c. 83, § 4; Va. Code, 1904, § 2619.

See Brown v. Putney, 90 Va. 447, 18 S. E. 883.

§ 853. Who should be appointed a guardian ad litem.

The prime consideration actuating the court in the selection of a suitable person to act as guardian *ad litem* is the due protection of the rights and interests of the infant.[52] In *Virginia*, it is expressly provided by statute that some discreet and competent attorney at law shall be appointed as guardian *ad litem;* or if no such attorney be found willing to act, some other discreet and proper person shall be appointed.[53] If the person thus designated can not be found, the court will be governed by the usual rule of practice obtaining in a court of equity in the absence of statute relating to the appointment or selection of a guardian *ad litem.* Under this rule, the court will usually appoint his general or testamentary guardian if there be one;[54] or, if for any reason such guardian be not appointed, the nearest relative of the infant or insane person not interested in the matter in controversy will generally be selected;[55] though a stranger may be appointed.[56] Where neither the general guardian nor nearest relative is appointed, the court may, but need not necessarily, appoint an attorney at law.[57] And the person appointed should be one without any interests adverse to those of the infant in the subject matter of suit.[58] A codefendant, having no adverse interest, may be a

[52] Grant v. Van Schoonhoven, 9 Paige Ch. (N. Y.) 255, 4 L. Ed. 690, 37 Am. Dec. 393.

[53] Va. Code, 1904, § 3255.

[54] Patterson, v. Pullman, 104 Ill. 80; Kesler v. Penninger, 59 Ill. 134; Scott v. Winningham, 79 Ga. 492, 4 S. E. 390. See Clark v. Clark, 70 W. Va. 428, 74 S. E. 234; Stewart v. Parr, 74 W. Va. 327, 82 S. E. 259.

[55] Grant v. Van Schoonhoven, 9 Paige Ch. (N. Y.) 255, 4 L. Ed. 690, 37 Am. Dec. 393; Rhoads v. Rhoads, 43 Ill. 239; U. S. Bank v. Ritchie, 8 Pet. (U. S.) 128, 8 L. Ed. 890; 1 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 161 and note.

[56] Rhoads v. Rhoads, 43 Ill. 239; U. S. Bank v. Ritchie, 8 Pet. (U. S.) 128, 8 L. Ed. 890. See Stewart v. Parr, 74 W. Va. 327, 82 S. E. 259.

[57] Carter v. Montgomery, 2 Tenn. Ch. 455; Bennett v. Wheeler, 1 Ir. Eq. R. 16.

[58] Matter of Frits, 2 Paige Ch. (N. Y.) 374, 2 L. Ed. 950; Ralston v. Lahee, 8 Ia. 17, 74 Am. Dec. 291; Estes v. Bridgforth, 114 Ala. 221, 21 So. 512.

guardian *ad litem*.[59] And where the infant is a married woman, it is usual to appoint her husband.[60] The clerk of the court in which the suit is pending may act as guardian *ad litem*.[60a]

§ 854. The duties of a guardian ad litem.

The whole duty of a guardian *ad litem* is to defend the suit on behalf of the infant or insane person, as the case may be,[61] and to do so earnestly and rigorously,[62] not merely in a perfunctory manner by filing a formal answer in the cause and doing nothing more.[63] He should make a *bona fide* examination into the facts and merits of the cause, so as fully to protect the interests of the infant in the suit.[64] In *Virginia*, the law expressly declares that every guardian *ad litem* shall faithfully represent the interest or estate of the infant or insane person for whom he is appointed.[65]

§ 855. The powers of a guardian ad litem.

A guardian *ad litem* may, when necessary, employ counsel to aid in the defense of an infant or insane person,[66] even though the guardian *ad litem* be himself a practicing attorney.[67] In the conduct of the cause, he has the power to act for the infant as to all the issues arising in the suit, whether it be the direct issue involved, or one collateral to the main issue, but which must necessarily be determined.[68] Thus, where, in an action by a wife against her husband for separate maintenance, it was suggested that the marriage was void because of the husband's insanity at the time it was contracted, the court was not required to proceed with an inquisition of insanity to determine such question, and appoint a conservator as a prerequisite to

[59] 1 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 162.
[60] *Idem*, 163.
[60a] Ferrell v. Deverick, 85 W. Va. 1, 100 S. E. 850.
[61] 1 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 163.
[62] Enos v. Capps, 12 Ill. 255; Rhoads v. Rhoads, 43 Ill. 239.
[63] Pinchback v. Graves, 42 Ark. 227; Allen v. McGee, 158 Ind. 465, 60 N. E. 460, 62 *idem* 1002.
[64] *Idem*.
[65] Va. Code, 1904, § 3255.
[66] Richardson v. Tyson, 110 Wis. 572, 86 N. W. 250, 84 Am. St. Rep. 937.
[67] *Idem*.
[68] Pyott v. Pyott, 90 Ill. App. 210.

the right of the husband to defend the suit by a duly appointed guardian *ad litem* before proceeding with the trial of the main action, but was entitled to appoint a guardian *ad litem* and determine the issues of insanity as one of the issues in the case.[69] The guardian *ad litem* can make no binding admissions adverse to the infant;[70] nor can he waive any of the infant's rights;[71] nor can he consent to the entry of a decree that is prejudicial to the interests of the infant.[72]

§ 856. The compensation of a guardian ad litem.

It is provided by statute, as we have already shown,[73] that a guardian *ad litem* shall be allowed a reasonable compensation, which must be paid by the party on whose motion he was appointed.[74]

§ 857. Summary proceeding for the sale, lease or mortgage of the estate of an infant or insane person.

In *West Virginia,* a summary proceeding is authorized by statute for the sale, lease or mortgage of the estate of an infant or insane person, by petition upon ten days' notice to all of the defendants to such petition. The petition, as to its parties, allegations and verification by oath, must in all respects conform to a bill in equity.[75] In fact, the procedure upon the peti-

[69] *Idem.*

[70] Walton v. Coulson, 1 McLean (U. S.) 120; *ante,* §§ 473, 474.

[71] Cartwright v. Wise, 14 Ill. 417; Quigley v. Roberts, 44 *idem* 503; *ante,* §§ 473, 474.

[72] Dangerfield v. Smith, 83 Va. 81, 1 S. E. 599.

"A guardian *ad litem* has no authority to consent to anything that will, in any manner, prejudice the infant's interest, but he may agree to such matters as are intended only to facilitate a hearing of the cause. He may consent that a certain designated person, possessing the requisite qualification, may hear the cause as special judge, the regular judge not sitting." Thompson v. Buffalo Land & Coal Co., 77 W. Va. 782, 88 S. E. 1040.

[73] *Ante,* § 425.

[74] W. Va. Code, 1913, c. 125, § 13.

As to the statute of *Virginia* in regard to the compensation of a guardian *ad litem, vide ante,* § 425, note 52.

[75] See *ante,* § 850; W. Va. Code, 1913, c. 83, § 12. It must be signed by the guardian and sworn to by him. Bailes v. Alderson, 82 W. Va. 342, 95 S. E. 1039. As to the necessity for notice and other procedural requirements, see French v. Pocahontas Coal & Coke Co., 104 S. E. 554 (W. Va. 1920).

tion is substantially the same as that which must be had upon a bill, except that the bill, of course, is filed at rules, and is heard upon depositions duly taken and filed in the cause, while the petition is filed in open court, and may be heard, as clearly indicated by the statute, upon evidence adduced *ore tenus*.[76] The court shall appoint a guardian *ad litem* to the minor or insane person who must be present at the hearing of such petition.[77]

§ 858. The decree to sell the estate of persons under disability or those interested in a trust.

If the proceedings to sell the estate of persons under the disability of infancy or insanity or who are interested in a trust be by bill in equity, and it be clearly shown, independently of any admissions in the answers, that the interest of the infant, insane person, or beneficiaries in the trust, as the case may be, will be promoted, and the court be of the opinion that the rights of no person will be violated thereby, it may decree that the said estate be sold, leased, mortgaged or encumbered by a deed of trust, or any part thereof, on such conditions and upon such terms as to the court shall seem to the best interests of the said infant, insane person, or beneficiary in the trust, as the case may be, and in case the sale of said land is decreed, the purchaser, when the sale is on credit, shall be required to give ample security, and if the sale be of real estate, a lien shall be retained thereon to secure the payment of the purchase money.[78] The statute of *West Virginia* expressly empowers the court to direct the sale upon such conditions and terms as to it shall seem to the best interests of the infant or other owner of the estate. This authority the court possesses in the absence of such express provision of this particular statute. Hence the court may decree that the sale be private and not

[76] Hogg, Eq. Princ., § 124, p. 210. See Lilly v. Claypool, 59 W. Va. 130, 53 S. E. 22.

[77] W. Va. Code, 1913, c. 83, § 13.

[78] W. Va. Code, 1913, c. 83, § 5; Va. Code, 1904, § 2620. The Virginia statute contains the provision, not found in the West Virginia statute, authorizing an exchange of lands. Va. Code, 1904, § 2620. Substantial compliance with the statutory procedure is essential to the jurisdiction of the court. Parker v. Stephenson, 127 Va. 431, 104 S. E. 39.

by way of public auction.[79] The land should be sold free of all encumbrances so that the title of the purchaser will be good.[80]

§ 859. The investment of the proceeds of sale of the infant's or other person's estate.

When sale is made of the estate of an infant, insane person, or one interested in trust property, the law prescribes that the proceeds thereof shall be invested under the direction of the court, for the use and benefit of the persons entitled to the estate, and in case of a trust estate, subject to the uses, limitations and conditions, contained in the writing creating the trust. But into whosesoever hands the said proceeds may be placed. the court shall take ample security, and from time to time require additional security, if necessary, and make any other proper orders for the faithful application of the fund, and for

[79] Palmer v. Garland, 81 Va. 444.

In this case "H., committee of G., a female lunatic, institutes a suit under Code 1873, c. 124, to sell her contingent estate in lands, and conducts it in the proper manner, and against the proper parties, and adduces the proper evidence, in every respect in accordance with the requirements of the statute, and in his bill he presents the bids of certain parties who already owned other contingent interests in the same lands. The court, deeming that the interest of the lunatic will be promoted and the rights of no one will be violated by the sale of her said contingent estate, decrees that the said bids, and the said estate of the lunatic therein, be conveyed to the said bidders.

"*Held:* The sale is lawful."

In the course of his opinion, Fauntleroy, J., says: "When, as in this case, the part owners are the only persons who are interested in bidding, and, therefore, no competition in bids can be hoped for, negotiations must take the place of a public sale, to prevent the sacrifice of the property sold. The evidence in the record shows that a fair result has been reached in this case and it would be mistaken kindness to reject it and take the bazard of a precarious auction."

A conditional sale made before suit brought may be approved and confirmed by the court. Smith v. White, 107 Va. 616, 59 S. E. 480.

As to the statute applying to decrees to be entered upon a petition in a summary proceeding in West Virginia for the sale, lease or mortgage of the estate of persons under disability, *vide* W. Va. Code, 1904, c. 83, § 14.

[80] Pierce v. Trigg, 10 Leigh (Va.) 406.

the management and preservation of any property, or securities in which the same may be invested, and for the protection of the rights of all the persons interested therein, whether such rights be vested or contingent.[81] The court may direct the proceeds of the sale of an infant's estate to be paid to his guardian,[82] and if such guardian does not give the additional bond contemplated by the statute to secure the proceeds of such sale. the guardian and his security in his official bond will be liable for the same on such bond.[83] But where the additional bond to secure the proceeds of the sale of the ward's estate is given, it is primarily liable for such proceeds.[84]

§ 860. The bond for the application of the proceeds of the sale or lease of lands.

It is provided by statute in *West Virginia* that in case a sale or lease of the estate of a party under the disability of infancy or insanity be made, the guardian or committee shall in open court enter into bond, with approved security, in a penalty equal to double the value of the estate to be sold, conditioned for the faithful application of the proceeds of sale or lease. And in case of mortgage or deed of trust the said guardian or committee shall enter into bond with approved security in a penalty equal to double the amount of any moneys which may come into his hands from the mortgaging or encumbrancing the same by deed of trust, conditioned for the faithful application of said moneys. And in either case such bonds shall be payable to the state, and the court may thereafter order a new bond, with other security to be given if deemed necessary.[85] If the bond contemplated by this statute be given, the sureties on the general bond of the guardian will not be liable for the proceeds of sale,[86] and it would seem that they should not be liable even if such bond be not given.[87]

[81] W. Va. Code, 1913, c. 83, § 7. See Va. Code, 1904, § 2622.

[82] Reed v. Hedges, 16 W. Va. 167.

[83] *Idem.* But see Kester v. Hill, 42 W. Va. 611, 26 S. E. 376.

[84] Findley v. Findley, 42 W. Va. 372, 26 S. E. 433.

[85] W. Va. Code, 1913, c. 83, § 15.

[86] Kester v. Hill, 42 W. Va. 611, 26 S. E. 376.

[87] *Idem.* But see Reed v. Hedges, 16 W. Va. 167.

§ 861. The effect of sale upon the status of the estate of an infant or insane person.

Inasmuch as one of the leading objects in conferring a power of sale upon the guardian of an infant or the committee of an insane person is the promotion of the interest of such infant or insane person, without violating the rights of any person, it is the policy of the law to preserve the status of all real estate that may be sold in such a case, so that the proceeds of sale will pass to those who would have been entitled to the land if it had not been sold.[88] The effect of the sale does not operate a conversion of the realty into personalty until the infant attains his majority and the insane person is restored to his sanity.[89]

[88] W. Va. Code, 1913, c. 83, § 11; Va. Code, 1904, § 2626.

[89] Vaughan v. Jones, 23 Gratt. (Va.) 444; Turner v. Dawson, 80 Va. 841; Findley v. Findley, 42 W. Va. 372, 26 S. E. 433.

In Vaughan v. Jones, Anderson, J., in the co rse of his opinion, says: "It is an established principle of courts of equity, says Judge Lomax, not to suffer the real estate of infants to be changed into personal, nor personal into real estate. Upon this principle the legislature of this state has directed, in the sale of infants' real estate under the authority of courts of chancery, that if the infant dies under twenty-one years, the proceeds of the sale shall be considered as real estate, and shall pass to such person as would have been entitled if it had not been sold. 1 Lomax Dig. top p. 239, marg. 202. This is substantially the purport of section 21 of chapter 108 of the R. C. of 1819. The sale of infants' real estate by the superior court of chancery, being authorized by previous sections of the act, what was the design of this 21st section? It seems to have been to guard against any change being made in the legal incidents and qualities attached to real estate, by the sale which had been authorized by the previous sections, both as it respects the rights and interests of the infant and of those to whom the real estate would descend in the event of his death intestate, under twenty-one years of age. And, therefore, it is provided, that the proceeds of the sale shall he considered as real estate, and at the death of the infant intestate, under twenty-one years of age, shall pass as real estate to those who would have been entitled to the land if it had not been sold. And the sale is only authorized, as appears from a previous section, provided their rights should not be violated. And without adopting the provision aforesaid in the twenty-first section, or the equitable principle of courts of chancery, a sale could not be made within that restriction."

§ 862. Petition to have dower or curtesy of infant or insane wife or husband released.

The law provides that if the husband of an infant or insane wife wish to sell real estate, and to have her right of dower therein released to the purchaser, or if the wife of an infant or insane husband wish to sell her real estate, and to have his right of curtesy therein released to the purchaser, he or she may petition for that purpose the circuit court of the county in which such estate, or some part thereof, is. And if it appear to the court to be proper, an order may be made for the execution of such a release, by a commissioner to be appointed by the court for the purpose; which release shall be effectual to pass the said right of dower or of curtesy to the purchaser. But the court may make such order as, in its opinion, may be proper to secure to her and to him the same interest in the purchase money and the income thereof, that he or she would have had in the real estate and the income thereof if it had not been sold; or, at the discretion of the court, to secure to her or to him, out of the purchase money, such sum in gross as, in the court's opinion, may be sufficient to compensate her or him for her right of dower, or his right of curtesy.[90]

§ 863. The procedure to release dower or curtesy of infant or insane wife or husband.

Inasmuch as dower is a pure common-law right[91]—a common-law estate—of the wife,[92] is neither equitable nor statutory separate property,[93] and can not be defeated or barred at the common law, except in a few instances not material to be noticed

[90] W. Va. Code, 1913, c. 83, § 10; Va. Code, 1904, § 2625.

Infant husbands and wives are not included within the provisions of the Virginia statute, and have been included within the West Virginia statute only since Acts of 1911, c. 44.

[91] Hoback v. Miller, 44 W. Va. 635, 29 S. E. 1014.

[92] Martin v. Martin, 22 Ala. 86, 105; Crookshanks v. Ransbarger, 80 W. Va. 21, 31, 92 S. E. 78; 25 W. Va. Law Quart. 135.

[93] Morrison v. Thistle, 67 Mo. 596, 599; Townsend v. Brown, 16 S. C. 91; McCormick v. Hunter, 50 Ind. 186; Bressler v. Kent, 61 Ill. 426, 14 Am. Rep. 67.

here,[94] and can be barred by statute only in strict compliance with the provisions and requirements thereof,[95] it necessarily follows that the dower of an insane wife can be released or barred only in the manner prescribed by statute as shown in the next preceding section. The proceeding by petition under this statute[96] is not *ex parte*, and the wife or husband whose rights are to be affected must be made a party thereto, and have reasonable notice of the time and the place where the petition will be filed.[97] If it appear to the court that the party is insane, the court may hear evidence or refer the matter to a commissioner to inquire into and report as to the status of the property, whether the wife or the husband, as the case may be, has a contingent right of dower or curtesy therein, the value thereof, and what sum should be set apart out of the proceeds of the sale in lieu of such contingent right of dower or curtesy therein.[98] When these matters have been ascertained and adjudicated, the court will authorize a commissioner to execute a deed conveying and relinquishing such right of dower or curtesy in such property.[99]

[94] 1 Washburn on Real Property (4th Ed.), 242, 244-270; Crookshanks v. Ransbarger, 80 W. Va. 21, 29, 92 S. E. 78; 25 W. Va. Law Quart. 136.

[95] Nicoll v. Ogden, 29 Ill. 323, 81 Am. Dec. 311; Grove v. Todd, 41 Md. 633, 20 Am. Rep. 76; Blair v. Sayre, 29 W. Va. 604, 2 S. E. 97; McMullen v. Eagan, 21 W. Va. 233; Crookshanks v. Ransbarger, 80 W. Va. 21, 92 S. E. 78.

[96] W. Va. Code, 1913, c. 83, § 10; Va. Code, 1904, § 2625.

[97] Hess v. Gale, 93 Va. 467, 25 S. E. 533.

[98] *Idem.*

[99] *Idem.* The principle, as laid down in the text, as to the procedure under this section, is deduced from the statute itself and the case just cited.

CHAPTER XXXIV

MISCELLANEOUS MATTERS OF PROCEDURE

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§ 864. Motion defined.

A motion is an application, either by a party to the proceedings or his counsel, not in writing,[1] made to the court, or judge

[1] But by a rule of the Supreme Court of the United States all motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion. 1 Beach, Mod. Eq. Pr., § 554, citing Rule 6, U. S. Supreme Court; Rule 21, U. S. C. C. A.

In the Supreme Court of Appeals of West Virginia, all motions except motions of course must be reduced to writing. Rule 8, § 1.

thereof at chambers, or in vacation, for the purpose of obtaining some rule or order of court which he deems necessary or proper in the cause, or to obtain relief in a summary manner in a matter which would otherwise operate as unjust or inequitable.[2] Motions are either of course or special; and the latter are either *ex parte* or upon notice.[3]

A motion can not be used to present anything to the court that is properly the subject of a pleading, but is confined to matters which are incidental to a presentation of the cause upon its merits.[4]

§ 865. Who may make a motion.

A motion may be made by or on behalf of any party to the record, provided such party be not in contempt of court;[5] and a person who is a *quasi* party to the cause, such as a claimant coming in under a decree, or a purchaser at a judicial sale, may also apply to the court in this manner.[6] But a motion will not be entertained by a person who is not a party to the record.[7]

[2] 1 Beach, Mod. Eq. Pr. § 554; 2 Daniell, Ch. Pr. (6th Am. Ed.), 1591; 2 Bouv. L. Diet. 199; Black's Law. Dict. 791; Shipman, Eq. Pl., 164.

[3] See same citations.

[4] Shipman, Eq. Pl., 165, citing 2 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 1603, 1604; Shaft v. Insurance Co., 67 N. Y. 544, 547, 23 Am. Rep. 138; Jones v. Roberts, 12 Sim. 189.

[5] 2 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 1591; 1 Beach, Mod. Eq. Pr., § 555.

[6] See same citations.

[7] Wallop v. Searburgh, 5 Gratt. (Va.) 1.

"A motion to quash a writ and inquisition founded on a judgment, must be in the name of the party on the record, and must be against such a party." *Idem.*

"A stranger having acquired an equitable right to the benefit of an execution, or to the property upon which it is levied, will generally have authority to sue out and conduct the process, or to object to its regularity or validity; but he must do it in the name of a legal party to the process, or one who can be made so. And his authority to use the name of the party to the process of a court of law, will be so far recognized by such court as to preclude the intervention of such party for the purpose of defeating it." *Idem.*

See Shipman, Eq. Pl., 166.

§ 866. Motion or other proceeding by a party in contempt.

Besides the punishment by fine and imprisonment to which a party subjects himself by a contempt of the process and orders of the court,[8] he places himself in the further predicament of not being in a situation to be heard in any application which he may desire to make to the court, until he has purged his contempt and paid the costs thereof.[9] Thus a party in contempt can not move to dissolve an injunction.[10] Though a party has disobeyed a court order, he may show that he is not in contempt, because of the fact that the court, when it made the order which he does not obey, was without jurisdiction as to such order.[11]

§ 867. Against whom a motion may be made.

A motion may be made against any party to the record, as well also as against one who has voluntarily submitted himself

[8] *Ante*, § 754.

[9] 1 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 505; 1 Beach, Mod. Eq. Pr., 556; Johnson v. Pinney, 1 Paige Ch. (N. Y.) 646, 2 L. Ed. 785 and note, 19 Am. Dec. 459; Rogers v. Paterson, 4 Paige Ch. (N. Y.) 450, 3 L. Ed. 511 and note.

"Where a rule is made upon a person to show cause why he shall not be punished for a contempt of the court, in aiding to obstruct the execution of a decree of the court, he purges himself of the contempt, by answering under oath, that in what he had done he acted as counsel in good faith, without any design, wish or expectation of committing any contempt of, or offering disrespect to, the court." Wells v. Commonwealth, 21 Gratt. (Va.) 500.

In West Virginia, the answer may be supported by affidavits. In State v. Harper's Ferry Co., 16 W. Va. at p. 873 in which the court in its opinion says: "Can this court properly hear evidence in these cases, or must they be heard only on the answers of the defendants to the rules issued against them? In proceedings of this character the weight of the authorities is in favor of the admission of other evidence than the answers of the defendants to the rule; and in our judgment this is the proper rule. See *Crooks et al.* v. *The People*, 16 Ill. 537; *Case of J. V. N. Yates*, 4 Johns. 373; *Commonwealth* v. *Dandridge*, 2 Va. Cas. 408, *sed vide Wells' Case*, 21 Gratt. 500. This court will therefore read the affidavits of James M. Mason, Charles J. Faulkner and W. H. Travers, and the other affidavits filed in considering these cases."

[10] Fadely v. Tomlinson, 41 W. Va. 606, 24 S. E. 645.

[11] Hebb v. County Court, 48 W. Va. 279, 37 S. E. 677.

to the authority of the court, as for illustration a purchaser of the subject matter of litigation during the pendency of the suit, or one who purchases at a judicial sale under an order or decree of the court.[12]

§ 868. Motions as matters of course.

A motion as matter of course is where by a rule, or the well-known practice of the court, the object of it is granted, and without hearing both sides. No notice of such a motion is necessary, as the court will not hear any defense to it.[13] Thus a motion made in the clerk's office for an order of publication, or an alias summons, or a motion for leave to file a demurrer to the bill, are clear instances of matter of course motions.[14] So, as we have seen, a suit may be revived in certain instances by motion as matter of course.[15]

§ 869. As to special motions ex parte.

A special motion is one which is not granted as matter of course, but only in the court's discretion and upon some proper ground to be laid for it, either by previous order, or by the pleadings in the cause, or by affidavits.[16] When such a motion is made *ex parte* it must be supported by affidavit.[17] Thus a motion for an injunction made *ex parte* is usually supported by affidavit.[18]

§ 870. Special motions made upon notice.

It is said to be impossible to lay down any clear rule defining such motions as may be made *ex parte,* and distinguishing them

[12] Smith v. Equitable Mortgage Co., 98 Ga. 240, 25 S. E. 423; Lord v. Meroney, 79 N. C. 14; Hill v. Hill, 58 Ill. 240; Barrett v. Churchill, 18 B. Mon. (Ky.) 387; Holland v. Seaver, 21 N. H. 386.

[13] 1 Beach, Mod. Eq. Pr., § 557.

[14] *Idem.*

[15] *Ante,* § 208. See also, Va. Code, 1904, § 3308.

[16] 1 Beach, Mod. Eq. Pr., § 558; 2 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 1593 *et seq.*

[17] *Idem.*

[18] *Ante,* § 730; 1 Bart, Ch. Pr. (2nd Ed.), 448.

from such as require notice.[19] When it is not clear from the law, or the settled practice of the court, whether a motion may be made *ex parte,* it should never be made except upon due notice.[20] Thus a motion to dissolve an injunction, as we have seen,[21] may be made in term time without notice upon a case matured for hearing, but otherwise only after notice.

§ 871. Some specific instances of special motions upon notice.

It is provided by statute in *Virginia* that upon the death or marriage of the ward in a suit by his guardian brought for the sale of his estate, such suit may be revived upon reasonable notice to all parties interested.[22] So if a cause has been discontinued, or a nonsuit entered therein, a motion to proceed to a trial will be entertained only after thirty days' notice to the defendant.[23] So upon motion in term time without notice, but upon a motion made in vacation after reasonable notice to the adverse party, a suit may be removed to another circuit court.[24] So generally, the appointment of a receiver will be made only upon notice as we have shown.[25] A notice is also required of a motion to authorize expenditures by a receiver,[26] or the issuance of certificates by him.[27] So where there has been any proceeding in the cause which has given the defendant a right against the plaintiff, the plaintiff can not dismiss his bill as of course and without notice.[28]

§ 872. As to the plaintiff's right to dismiss his bill.

It is a general rule founded upon the English chancery practice that a plaintiff may dismiss his bill without prejudice at

[19] 2 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 1593.

[20] *Idem.*

[21] *Ante,* § 743.

[22] Va. Code, 1904, § 2616*a*.

[23] W. Va. Code, 1913, c. 127, § 12.

[24] W. Va. Code, 1913, c. 128, § 1. In Virginia, the motion, whether made in term time or in vacation, must be upon twenty days' notice. Va. Code, 1904, § 3316.

[25] *Ante,* § 771.

[26] *Ex parte* Mitchell, 12 S. C. 86.

[27] State v. Port Royal, etc., R. Co., 45 S. C. 413, 23 S. E. 363.

[28] 1 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 791, 792.

any time before final decree. He has the undoubted right to control the fortunes of his own bill and dismiss it as a matter of course.[29] But the dismissal should always be at his costs.[30] But a nonsuit can not be taken, because the law as to nonsuits has no application in equity.[31] Nor can the plaintiff dismiss his bill in a creditors' suit, after an order of reference, because his claim has been paid, where there are other creditors with unsatisfied demands against the defendant;[32] nor, as matter of right, can he dismiss his bill when to do so would work a prejudice to the rights and interests of the other parties.[33] And the plaintiff can not dismiss his bill as matter of right where a defendant has filed a cross-bill or answer setting up a claim to affirmative relief.[34] An infant plaintiff may dismiss a bill on coming of age which was filed during his minority.[35]

§ 873. Dismissal of the bill as to part of the defendants.

"A plaintiff can not voluntarily terminate a suit as to a part of the defendants, unless the suit might originally have been

[29] Reilly v. Reilly, 139 Ill. 183, 28 N. E. 960; Gage v. Bailey, 119 Ill. 539, 9 N. E. 199; Simpson v. Brewster, 9 Paige Ch. (N. Y.) 245, 4 L. Ed. 687 and note; Cummins v. Bennett, 8 Paige Ch. (N. Y.) 79, 4 L. Ed. 352 and note; Langlois v. Matthiessen, 155 Ill. 230, 40 N. E. 496; 1 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 790 and note; 1 Beach, Mod. Eq. Pr., § 450; Glascock v. Brandon, 35 W. Va. 85, 12 S. E. 1102.

[30] Simpson v. Brewster, 9 Paige Ch. (N. Y.) 245, 4 L. Ed. 687; Cummins v. Bennett, 8 Paige Ch. (N. Y.) 79, 4 L. Ed. 352; Langlois v. Matthiessen, 155 Ill. 230, 40 N. E. 496.

[31] Strang v. Weir, 47 S. Car. 307, 25 S. E. 157.

[32] Dunfee v. Childs, 45 W. Va. 155, 30 S. E. 102; Lewis v. Laidley, 39 W. Va. 422, 19 S. E. 378; Maxwell v. Northern Trust Co., 70 Minn. 334, 73 N. W. 173; Linsey v. McGannon, 9 W. Va. 154; Honesdale v. Montgomery, 56 W. Va. 397, 49 S. E. 434.

[33] 1 Beach, Mod. Eq. Pr., § 450; Bates v. Skidmore, 170 Ill. 233, 48 N. E. 962.

[34] Davis v. Hall, 92 Ill. 85; Clark v. Hundley, 65 Cal. 96, 3 Pac. 131; Jackson v. Roan, 96 Ga. 40, 23 S. E. 118; Tift v. Keaton, 78 Ga. 235, 2 S. E. 690; Wiswell v. First Cong. Church, 14 Ohio St. 31; Callahan v. Hicks, 90 Fed. 539; Pethtel v. McCullough 49 W. Va. 520, 39 S. E. 199; Pyle v. Henderson, 65 W. Va. 39, 63 S. E. 762.

[35] Anonymous, 4 Madd. 461.

maintained as to the rest."[36] Nor can a suit be discontinued as to a person sued as a partner unless it affirmatively appear that he is not a member of the firm,[37] or that he is a nonresident and not served with process.[38] If the suit is against persons as partners within the jurisdiction of the court and proper parties to the suit, the cause can not be dismissed as to one without a dismissal as to all.[39] But where joint parties are not served with process by reason of being out of the jurisdiction, a discontinuance as to such parties is not a discontinuance as to the others.[40]

§ 874. Dismissal of the bill contrary to stipulation.

When the parties stipulated and made their stipulation a part of the record that a certain decree should be entered in the cause, it was held that the complainant thereby relinquished all power over the case, and an order permitting him to dismiss the bill was reversed on appeal.[41] Where a stipulation upon a bill for an account provided for an arbitration, and that the award should be the basis of a decree by the court, and should be entered as the finding of the court as to the accounts, the complainant was not allowed to dismiss his bill after the overruling of his motion to set aside the award.[42]

[36] 6 Enc. Pl. & Prac., 856, 857; Cook v. Phillips, 18 Tex. 31; Shipman v. Allee, 29 Tex. 17.

[37] Gazzam v. Bebee, 8 Port. (Ala.) 49; Johnson v. Green, 4 Port (Ala.) 127, and cases cited; 14 Cyc. 411. But see, W. Va. Code, 1913, c. 125, § 52.

"Where, on the trial, it appears that a part of several defendants, sued as partners, are not such, the court will discontinue as to them, and enter judgment against the others." Johnson v. Green, *supra*.

[38] Brown v. Belches, 1 Wash. (Va.) 9.

[39] Storm v. Roberts, 54 Iowa 678, 7 N. W. 124.

[40] Adkins v. Allen, 1 Stew. (Ala.) 130; Shields v. Perkins, 2 Bibb. (Ky.) 227; Alston v. State Bank, 9 Ark. 455; 14 Cyc. 413, 414.

[41] 1 Beach, Mod. Eq. Pr., § 458, citing Coultas v. Green, 43 Ill. 277.

But consent may be withdrawn at any time before entry of the decree, although a draft of the decree has been signed by the parties. Herold v. Craig, 59 W. Va. 353, 53 S. E. 466; *ante*, § 609.

[42] 1 Beach, Mod. Eq. Pr., § 458, citing Ives v. Ashelby, 26 Ill. App. 244.

§ 875. Dismissal of the bill "without prejudice."

When the bill is dismissed upon motion of the plaintiff, it is the safe, usual and convenient practice to dismiss it without prejudice.[43] Where no words of qualification appear in the order of dismissal, it is presumed that the order was entered upon its merits, and is a bar to a subsequent bill for the same cause.[44]

§ 876. Dismissal of the bill "agreed."

If a suit is dismissed and the order recites that it is "dismissed agreed," this constitutes a bar to a subsequent suit for the same cause of action, upon the principle of a compromise decree on the merits, or that such a dismissal is equivalent to a *retraxit* at common law, which is an "open, voluntary renunciation of the plaintiff's claim in court, whereby he forever loses his action."[45]

[43] Kempton v. Burgess, 136 Mass. 192, 193. See *ante*, § 400, and cases cited.

[44] Borrowscale v. Tuttle, 5 Allen, 377; Howth v. Owens, 30 Fed. 910; Lyon v. Perin, etc., Co., 125 U. S. 698, 8 S. Ct. 1024, 31 L. Ed. 839; Kempton v. Burgess, 136 Mass. 192, 193; Durant v. Essex Co., 7 Wall. 107; see also *ante*, § 400. As to the effect of a dismissal of a suit under the "four-year rule," *vide ante*, § 400, note.

[45] Pethel v. McCullough, 49 W. Va. 520, 39 S. E. 199.

In this case Brannon, J., in the course of his opinion says: "It is a bar to another suit upon the same cause on the principle of a compromise decree on the merits in equity, or a *retraxit* at common law, either of which is a bar to another suit. *Hoover* v. *Mitchell*, 25 Gratt. 387, holds it *prima facie* final at least; but *Wohlford* v. *Compton*, 79 Va. 333, holds it final as to all matters which were actually, or might have been, litigated in the suit. In *Siron* v. *Ruleman*, 32 Gratt. 223, it is so declared. In *Jarboe* v. *Smith*, 10 B. Mon. 257, 52 Am. Dec. 541, it is held a bar 'between all parties on the original cause of action, unless there is an express stipulation that another suit may be brought.' Such is the great weight of authority. 1 Freem. Judgm. s. 262; 1 Herm. Estop. 296; 1 Van Fleet, Former Adj. s. 33. One decision of the United States supreme court denies this position. *Haldeman* v. *U. S.*, 91 U. S. 584, [23 L. Ed. 433]. But *U. S.* v. *Parker*, 120 U. S. 89 [7 Sup. Ct. 454, 30 L. Ed. 601], holds the doctrine stated. So, 2 Black Judgm., § 706, says that it is settled law. The point is not decided in *Stockton* v. *Copeland*, 30 W. Va. 674 [5 S. E. 143]. The words "dismissed agreed" are very

§ 877. Dismissal or discontinuance of a cause for failure to prosecute the same.

It is provided by statute in the *Virginias* that if a party plaintiff dies and his death be suggested upon the record, and no steps be taken by the proper party or parties by motion or *scire facias* at or before the second term next after that at which such suggestion is made to revive the suit, such suit shall be discontinued, unless good cause be shown to the contrary.[46] It is further provided by statute that "any court in which is pending any case wherein for more than two years,[47] there has been no order or proceeding but to continue it, may, in its discretion, order such case to be struck from its docket; and it shall thereby be discontinued. A court making such order may direct it to be published in such newspaper as it may name."[48] But the cause is not discontinued by operation of the statute until the order of the court dismissing it has been entered.[49] A suit will not be dismissed for want of prosecution where the

strong. Though the order is abbreviated, so far as it goes it imports compromise and adjustment and a decree ending the case on that ground. A compromise decree is final. *Lockwood* v. *Holliday*, 16 W. Va. 651; *U. S.* v. *Parker*, *supra*. A dismissal agreed is equivalent to a *retraxit* at common law, which is an 'open voluntary renunciation of his claim in court, and by this he forever loses his action.' 3 Bl. Comm. 296. In the words of the court in *Hoover* v. *Mitchell*, cited, this short expression is 'a declaration of record sanctioned by the judgment of the court, that the cause of action has been adjusted by the parties themselves in their own way, and that the suit is dismissed agreed.'"

[46] W. Va. Code, 1913, c. 127, § 7; Va. Code, 1904, § 3311.

See Gainer v. Gainer, 30 W. Va. 390, 4 S. E. 424.

[47] In Virginia five years.

[48] W. Va. Code, 1913, c. 127, § 8. As amended by Acts of 1921, c. 66. Prior to Acts of 1921, the time was four years. Va. Code, 1904, § 3312.

[49] Gillespie v. Bailey, 12 W. Va. 70; Buster v. Holland, 27 W. Va. 510. "A chancery cause is pending in the circuit court, in which an order of reference is made on May 10, 1871; within the four years prior to October 13, 1877, no order had been made in the cause, but within that time the commissioner, to whom the cause was referred, had taken depositions upon the matters referred to him, though neither the depositions nor the report were returned to court or filed in the cause; then on said last mentioned day, in the absence of the plaintiff and her counsel, an order is entered by the court on the motion of defendants' counsel striking the cause from the docket under the provisions of section 8, chapter 127, of the Code; after two terms of the court had

delay was at the request of the defendant and for his benefit.[50] But negotiations for a settlement will not excuse a default in the regular proceedings of the court, unless embodied in an express agreement between the parties.[51] Care should be taken in the draft of the order dismissing the suit for failure to prosecute it, that the order be "without prejudice," as an order simply reciting the plaintiff's failure to prosecute his suit and ordering its dismissal is in effect a final decree, and can be set aside only by appeal, or by bill of review, within the periods limited by statute.[52]

§ 878. Reinstatement of the cause after its dismissal.

The statute of *West Virginia* provides that any circuit court may on motion reinstate on the trial docket of the court any case dismissed and set aside any nonsuit that may be entered by reason of the nonappearance of the plaintiff, within three terms after the order of dismissal may have been made, or order of nonsuit entered.[53] In *Virginia,* if a suit has been dismissed under the "five-year rule," it may be reinstated on motion within one year from the date of the order of dismissal, but not after that.[54]

passed and within three years from the date of said order, the plaintiff by leave of the court filed his bill of review to have said order set aside for errors apparent upon the record, and the said bill was sustained and the order set aside by the circuit court. Upon appeal the said order setting aside the order striking the cause from the docket is affirmed by this court, the judges being equally divided on the question as to whether said order should be reversed or affirmed." Millbank v. Ingersoll, 29 W. Va. 396, 1 S. E. 575. See Taylor v. Taylor, 76 W. Va. 469, 85 S. E. 652.

[50] Person v. Nevitt, 32 Miss. 180; Doyle v. Devane, 1 Freem. (Miss.) Ch. 345; Dixon v. Rutherford, 26 Ga. 153.

[51] Norton v. Kosboth, Hopk. Ch. (N. Y.) 101, 2 L. Ed. 357; Orphan Asylum v. McCartee, *idem*, 106, 2 L. Ed. 359.

[52] Jones v. Turner, 81 Va. 709; Battaile v. Maryland Hospital, 76 Va. 63; Snead v. Atkinson, 121 Va. 182, 92 S. E. 835.

[53] W. Va. Code, 1913, c. 127, § 11. By Acts of 1921, c. 66, an amendment was added to this section requiring payment of costs as a condition to the reinstatement.

[54] Va. Code, 1904, § 3312; Snead v. Atkinson, 121 Va. 182, 92 S. E. 835.

§ 879. Stipulations of the parties waiving the taking of proof.

The courts always encourage the practice of stipulations and agreements between the parties or their counsel in the form of admissions and concessions whereby the delay and expense incident to the taking of depositions are avoided.[55] They ought in general to be in writing and signed by the parties, or their solicitors,[56] as they will not usually be regarded in a court of equity unless thus put in writing.[57] Stipulations in reference to the evidence will receive a fair and liberal construction so as to promote the intention of the parties and a fair hearing of the cause upon its merits.[58] But if they are contrary to public policy or a rule of court, or contravene established principles of law, they will not be enforced.[59] An agreement that certain facts stated in the report of a prior case may be read in evidence is an agreement that those facts may be considered as legal evidence in the pending cause.[60] A stipulation that a deposition taken in another cause may be read with the same force and effect as if taken upon proper notice is not a waiver of any other objection, and does not entitle the party to read the deposition if the presence of the witness at the trial would otherwise exclude it.[61] And a stipulation that a deposition in another cause may be used does not imply that incompetent evidence therein is to be received if seasonably objected to.[62]

§ 880. Orders and decrees nunc pro tunc.

Where a defendant dies after the agreement and submission of the cause and before judgment, the decree will be entered so

[55] 1 Beach, Mod. Eq. Pr., § 532; 1 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 848, 849; Shipman, Eq. Pl., 130. See McCoy v. McCoy, 74 W. Va. 64, 81 S. E. 562, Ann. Cas. 1916C, 367.

[56] See same citations.

[57] Shipman, Eq. Pl., 130.

[58] O'Neal v. Cleaveland, 3 Nev. 497; Foster v. Dickerson, 64 Vt. 233, 24 Atl. 253.

[59] 1 Beach, Mod. Eq. Pr., § 532; Fox v. Martin, 108 Wis. 99, 84 N. W. 23; Hughes v. Kelly, 2 Va. Dec. 588, 30 S. E. 387.

[60] Thompson v. Thompson, 91 Ala. 591, 8 So. 419, 11 L. R. A. 443.

[61] Schmitz v. St. Louis Ry. Co., 46 Mo. App. 380.

[62] Appeal of Bridgham, 82 Me. 323, 19 Atl. 824.

as to have relation back as of the day of final hearing.[63] So it is held that an order confirming a sale may be entered *nunc pro tunc,* upon competent evidence that such order was in fact

[63] 2 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 1017, note 7, citing Campbell v. Mesier, 4 John. Ch. (N. Y.) 334, 8 Am. Dec. 570; Benson v. Wolverton, 16 N. J. Eq. 110, 111; Burnham v. Dalling, 16 N. J. Eq. 310, 312; Bank of United States v. Weisiger, 2 Peters (U. S.) 481.

"A decree *nunc pro tunc* is always admissible where a decree was ordered or intended to be entered, and was omitted to be entered only by the inadvertence of the court; but a decree, which was not actually meant to be made in a final form, can not be entered in that shape, *nunc pro tunc,* in order to give validity to an act done by a judicial officer under a supposition that the decree was final instead of interlocutory. Gray v. Brignardello, 1 Wallace U. S. 627. Whenever by any accident there has been an omission by the proper officer to enter any proceedings of a court of record, the court has the power, and it is its duty, on the application of any person interested, to have such proceeding recorded as of its proper date. And it is no ground for refusing such amendment that the rights of third persons will be injuriously affected thereby. Foster v. Woodfin, 65 N. C. 29. And see, for instances of orders *nunc pro tunc,* United States v. Gomez, 1 Wall. 690; Supervisors v. Durant, 9 Wall. 736; *Newland* v. *Gaines,* 1 Heisk. 720. But where, after the decree was orally pronounced, the record was destroyed by the great fire of 1871 in Chicago, it was held error to refuse a motion to postpone the final decree until the evidence was supplied. Hughes v. Washington, 65 Ill. 245. A decree was also held invalid which was rendered before supplying a lost supplemental bill on which it was based. Groch v. Stenger, 65 Ill. 481." 2 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 1017, note.

"The court may in the exercise of its general jurisdiction by a *nunc pro tunc* judgment or decree cause its records to speak the truth respecting any interlocutory or final judgment or decree which on some previous day or term was actually and in fact ordered.

"And when a cause has been matured and submitted, and a party has done all in his power to secure a judgment or decree in his favor, but dies after submission and before a final judgment or decree is pronounced in his favor, the court may, when the final judgment or decree ordered has by mistake been omitted from the record or it becomes necessary to protect his rights, enter a judgment or decree *nunc pro tunc* to relate back to the date the same was actually ordered or to the date of the submission of the cause for final decision. But such *nunc pro tunc* judgment or decree must always show to what date or term it is made to relate." Lively v. Griffith, 84 W. Va. 393, 99 S. E. 512.

See Payne v. Riggs, 80 W. Va. 57, 92 S. E. 133; 25 W. Va. L. Quart. 80.

made.[64] And an order of sale may be amended *nunc pro tunc* at any time to cure clerical omissions or mistakes therein.[65]

§ 881. As to the use of affidavits in equity.

"An affidavit is an oath in writing, sworn to before some person who has authority to administer an oath."[66] Affidavits are of frequent use in a court of equity. Thus they may be resorted to in the support of, and in opposition to, interlocutory applications, or for showing the service of process, notices, etc., and they may also be used in certain cases in support of the bill or of the answer.[67]

§ 882. When affidavits can not be used on a motion to dissolve an injunction.

We have already seen[68] that the truth of the plaintiff's case upon an application for an injunction is usually shown by affidavit;[69] and that a motion to dissolve ought not to prevail on mere affidavits.[70] While it is not easy to say how far and with what effect *ex parte* affidavits may be read on a motion to dissolve an injunction,[71] still it may with safety be stated that if new matter, or an equity independently of the bill be set up in the answer, to avoid or repel the claim made out by the plaintiff's bill for an injunction, the affirmative matter contained in the answer being contraverted by a general replication thereto, upon a motion to dissolve the injunction affidavits taken *ex parte* can not be read to establish such new matter in avoidance, and not in denial of the allegations made in the bill.[72]

[64] Jacks v. Adamson, 56 Ohio St. 397, 47 N. E. 48, 60 Am. St. Rep. 749; citing Ludlow's Heirs v. Johnston, 3 Ohio 553, 17 Am. Dec. 609. See Butler v. Emmett, 8 Paige Ch. (N. Y.) 12, 4 L. Ed. 326, and note,

[65] Farrington v. King, 1 Bradf. (N. Y.) 182; Jones v. Woodstock Iron Co., 95 Ala. 551, 10 So. 635.

[66] 1 Beach, Mod. Eq. Pr., § 598.

[67] *Idem;* Adams, Equity (8th Ed.), 348, 355, 356; 1 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 888, and note.

[68] *Ante*, § 730.

[69] Adams, Eq. (8th Ed.), 356.

[70] *Ante*, § 739.

[71] Shinn v. Board of Education, 39 W. Va. 508, 509, 20 S. E. 604.

[72] Noyes v. Vickers 39 W. Va. 30, 19 S. E. 429, 431, citing Vreeland v. Stone Co., 25 N. J. Eq. 140;

The reason for this rule is said to be that, if the use of affidavits were permitted, the plaintiff could not, by cross-examination, meet this affirmative defense of which he now hears for the first time, and it is the duty of the defendant to furnish full proof as to such new matter.[73] Nor can affidavits be used to establish the title of the plaintiff upon a motion to dissolve, when such title is denied by an answer and not sustained by documentary proof.[74] Nor can affidavits be read when the injunction cause is heard upon its merits, as it should be prosecuted and defended on depositions regularly taken and filed in the cause.[75]

§ 883. When affidavits may be used on a motion to dissolve an injunction.

If a motion to dissolve an injunction be made after the defendant has filed his answer denying the allegations of the bill upon which the right to an injunction is founded, and before the cause is heard upon its merits, there are some exceptional instances in which *ex parte* affidavits may be used. Thus, if the bill allege irreparable injury, such as the commission of waste, or the violation of copyrights or patent rights or the creation or maintenance of a nuisance, affidavits may be used upon the hearing of an interlocutory motion to dissolve the injunction relating to such matters.[76] While on a motion to

Wooten v. Smith, 27 Ga. 216; Armstrong v. Grafton, 23 W. Va. 50, 55; Kerr v. Hill, 27 W. Va. 576. See Grobe v. Roup, 46 W. Va. 488, 33 S. E. 261; Williamson v. Jones, 39 W. Va. 239, 19 S. E. 436, 447, 25 L. R. A. 222.

[73] Noyes v. Vickers, 39 W. Va. 30, 19 S. E. 429; Grobe v. Roup, 46 W. Va. 488, 33 S. E. 261.

[74] Adams, Eq. (8th Ed.), 356, 357.

[75] 1 Bart., Ch. Pr. (2d Ed.), 493; Virginian Railway Co. v. Echols, 117 Va. 182, 83 S. E. 1082.

[76] 2 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 1670, note 3, citing many cases; Henry v. Watson, 109 Ala. 335, 19 So. 413; Long v. Brown, 4 Ala. 622, 631, 632; Isaac v. Humpage, 1 Ves. Jr. 427 and note (*a*); Kersey v. Rash, 3 Del. Ch. 321; Lewis v. Leak, 9 Ga. 95; Merwin v. Smith, 2 N. J. Eq. (36) 182; Eastburn v. Kirk, 1 John. Ch. (N. Y.) 445, 1 L. Ed. 203; Indian River Steamboat Co. v. East Coast Transp. Co., 28 Fla. 387, 10 So. 480, 29 Am. St. Rep. 258; Fuller v. Cason, 26 Fla. 476, 7 So. 870.

dissolve an injunction after the answer has been filed it is the common practice in *West Virginia* to read affidavits taken without notice, in support of the equity of the bill, and counter-affidavits taken in like manner in support of the denials of the answer,[77] still we think that the instances in which *ex parte* affidavits may be so used are those mentioned in this section in cases of irreparable injury, and that these cases, as a general rule, mark the limit of the extent to which such affidavits may be so used. Of course, in those cases, and they frequently occur, where the plaintiff has not had time in which to take depositions in support of his bill, *ex parte* affidavits may be used to sustain the bill, and counter-affidavits in support of the answer.[78]

§ 884. The payment of money into court.

There are many instances wherein the court will order money paid or choses in action brought into court before a final decree.[79] This is usually done in the case of personal representatives, or other persons acting in a fiduciary character, having money in their hands, or stock under their control, to which the plaintiff can make out a *prima facie* title.[80] In order to induce the court to direct the money to be brought into court upon an interlocutory application, it must clearly appear that the money is a trust fund or that it belongs to the plaintiff or the plaintiff has an interest in it.[81] If it is not impressed with a trust, but is in the nature of a mere debt, or does not

In Poor v. Carleton, 3 Sumn. (U. S.) 70, Story, J., said: "I should not hesitate to admit affidavits to contradict the answer for the purpose of continuing or even of granting a special injunction where I perceived that without it irreparable mischiefs would arise."

[77] Williamson v. Jones, 39 W. Va. 239, 19 S. E. 436, 25 L. R. A. 222.

[78] 1 Bart., Ch. Pr. (2nd Ed.), 493; Virginia Railway Co. v. Echols, 117 Va. 182, 83 S. E. 1082.

[79] 1 Beach, Mod. Eq. Pr., § 603; Adams, Equity, 258, 259, 349, 350-352, 359, 394, 395; 2 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 1770.

[80] 2 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 1770. As to trustees, see Grinnan v. Long, 22 W. Va. 693.

[81] 2 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 1774; 1 Beach, Mod. Eq. Pr., § 603; Adams, Equity (8th Ed.), 350; Grinnan v. Long, 22 W. Va. 693.

belong to the plaintiff, or is a fund in which he is not interested, the court will decline to make an order for its payment into court till the hearing of the cause.[82] And furthermore, before the order will be made, the defendant must admit that the fund in his hands is a trust fund, or one belonging to the plaintiff, or in which the plaintiff is interested, and that the fund is actually in his possession or control.[83] The money will not be ordered to be paid into court which is not ascertained to be due by an account or decree in the cause, or admitted to be due by the answer or other proceedings in the cause. A parol admission proved by affidavit is not sufficient.[84] As a general rule, upon a bill filed against an executor or administrator for the distribution of the estate of the decedent, if it appears that there is a clear balance in his hands uninvested, beyond all just claims made by him upon the fund, such balance will be directed to be brought into court and invested pending the suit.[85] Where the subject of litigation was a fund in the hands of an insolvent assignee who was a defendant in the cause and had no personal interest therein, but claimed the fund for the benefit of others, the money was ordered to be brought into court and invested to abide the further order of the court. Where the right to a debt due from a third person is in litigation, it can not with safety be paid to either party after notice, but the debtor will be permitted, pending the litigation, to pay it into court to the credit of the cause.[86]

§ 885. Same subject further considered.

The defendant must not only admit his possession and control of the fund, as well as the plaintiff's interest in or title there-

[82] 2 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 1774; 1 Beach, Mod. Eq. Pr., § 603; Grinnan v. Long, 22 W. Va. 693.

[83] Haggerty v. Duane, 1 Paige, Ch. (N. Y.) 321, 2 L. Ed. 664; 2 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 1774; Adams, Equity (8th Ed.), 350; McTighe v. Dean, 22 N. J. Eq. 81; Boschette v. Power, 8 Beav. 99; Proudfoot v. Hume, 4 Beav. 476; Jefferies v. Biggs, 7 Eng. L. and Eq., 152; 1 Beach, Mod. Eq. Pr., § 604; Grinnan v. Long, 22 W. Va. 693.

[84] 1 Beach, Mod. Eq. Pr., § 604.

[85] Hosack v. Rogers, 6 Paige Ch. (N. Y.) 415, 3 L. Ed. 1044.

[86] 1 Beach, Mod Eq. Pr., § 603.

to,[87] but if he at the same time alleges a claim of his own against it, or any personal liability upon him by reason of it, the order will not be made, except as to that part in excess of the personal claim or liability.[88] If, therefore, a defendant admits a sum of money to have come to his hands properly belonging to the trust, but adds that he has made, or will have to make, payments on account of the estate, he will be allowed to deduct the amount of the payments, and to pay in the balance only.[89] In Campbell v. Braxton,[90] there was a report of a commissioner showing a balance due from a defendant as an executor, but the court declined to make an order directing the payment of the money into court, holding that the plaintiff should proceed to a decree, to be enforced by the usual process of the court.

§ 886. The court's control of the fund when paid over.

When the money has been paid into the court, it is then under the full direction and control of the court, and the court's possession can not be disturbed and affected by other proceedings or process had in or emanating from another cause.[91] Pending the suit, the court may permit the transfer of the funds to any claimant thereof, under proper stipulations, without losing its control over them.[92]

[87] *Ante*, § 884.

[88] 2 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 1774; Hagel v. Cunie, L. R. 2 Ch. 449.

[89] 2 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 1773.

[90] 4 H. and M. (Va.), 446.

[91] Tuck v. Manning, 150 Mass. 211, 22 N. E. 1001, 5 L. R. A. 666.

[92] *In re* application of Rochester, 136 N. Y. 83, 32 N. E. 702, 19 L. R. A. 161.

CHAPTER XXXV.

COSTS

§ 887. General observations and some general principles relating to the law of costs.
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§ 890. Costs with reference to pleas in abatement.
§ 891. Costs in cases of amendment.
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§ 894. Costs in suits by and against fiduciaries.
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§ 887. General observations and some general principles relating to the law of costs.

What is here said with reference to the matter of costs relates entirely to the circuit courts, and in *Virginia*, also corporation courts, which we do not have in *West Virginia*, and, of course, to civil suits alone. It is prescribed by law that, where it is not otherwise provided, the party for whom final judgment[1] is given in any action, or in a motion for judgment

[1] "The word 'judgment' includes decrees and also orders in chancery for the payment of money and bonds or recognizances, having the force of judgments." W. Va. Code, 1913, c. 13, § 17, cl. 12; Va. Code, 1904, § 3557.

for money, whether he be plaintiff or defendant, shall recover his costs against the opposite party; and when the action is against two or more, and there is a judgment for or discontinuance as to some, but not all, of the defendants, unless the court enter of record that there was reasonable cause for making defendants those for whom there is judgment, or as to whom there is such discontinuance (and order otherwise) they shall recover their costs.[2]

§ 888. Same matter further considered.

The statute declares that the laws of costs shall not be interpreted as penal laws, nor shall anything in the chapter of the Code making general provision for the payment of costs take away or abridge the discretion of a court of equity over the subject of costs, except that in every case in an appellate court costs shall be recovered by the party substantially prevailing.[3] It is a general rule that no one can be required to pay costs who is not a party to the suit,[4] except that in the instance of the action of ejectment, where a party in interest, though not a party to the suit, defends it in the name of another, who is his tenant, such person may be required to pay the costs upon the failure of the defendant to do so;[5] and in the further

[2] W. Va. Code, 1913, c. 138, § 8; Va. Code, 1904, § 3545.

"The successful party in a suit can not maintain a subsequent independent action to recover the costs of litigation incurred in the necessary prosecution or defense of such suit, where the same was not adjudged to him therein.

"All costs properly recoverable by a successful litigant must be recovered in the suit in which they are incurred; otherwise, they are barred by the rule of *res adjudicata.*" Armentrout v. Lambert, 83 W. Va. 569, 98 S. E. 731.

[3] W. Va. Code, 1913, c. 138, § 10; Va. Code, 1904, § 3547; Adkins v. Edwards, 83 Va. 300, 2 S. E. 435; Freer v. Davis, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895; Frye v. Miley, 54 W. Va. 324, 46 S. E. 135; Sprinkle v. Duty, 54 W. Va. 559, 46 S. E. 557; Conklyn v. Shenandoah Milling Co., 68 W. Va. 567, 70 S. E. 274; Bice v. Boothsville Telephone Co., 62 W. Va. 521, 59 S. E. 501, 125 Am. St. Rep. 986; Litz v. Rowe, 117 Va. 752, 86 S. E. 155.

[4] Johnston v. Manns, 21 W. Va. 19.

[5] *Idem.*

In the opinion in this case, the reason for this exception is thus stated: "The ground of the dis-

instance in which a suit is brought in the name of one person for the benefit of another, where, if there be a judgment for defendant's costs, it would be against such other;[6] nor will a court of equity impose the payment of costs upon a party who is in no wise in the wrong.[7] At common law, costs were not recoverable, and it is by virtue of statute alone that a judgment for costs *eo nomine* can be recovered in favor of either party.[8] But nevertheless it is a general and well-settled principle that the awarding of costs lies within the discretion of a court of equity.[9] Still, it is a rule generally observed by the courts, both at law and in equity, upon the final determination of the cause, to allow the costs to follow the recovery and go

tinction is, that in ejectment the suit can only be brought against the party in possession, where the premises are occupied, and the courts will not permit the party really interested to put an irresponsible party in possession to evade costs. It would seem unjust that the party most interested should be permitted to appear in court by counsel, defend the action and have the whole benefit resulting from the action; and then escape all responsibility that should result from an adverse determination of the action. In *Hutchinson* v. *Greenwood*, 82 Com. L. Report 324, the decree by two judges of three who sat in the case, went much further and held, that though the parties who carried on the defense had no interest whatever in the land, but who carried on the defense in the name of the parties in possession for a young lady, a relation who claimed to own the land, yet they were on a rule, required to pay the costs. Lord Campbell, C. J., said: 'The principle is, that the individuals, who order an appearance to be entered in ejectment in the names of those not really defending the suit, abuse our process, and that, as they substantially are the suitors, we have jurisdiction to make them pay the costs.' "

[6] Morgan v. Hale, 12 W. Va. 713; Foreman Shoe Co. v. Lewis, 191 Ill. 155, 60 N. E. 971; Western Union Telegraph Co. v. First Nat. Bank of Berryville, 116 Va. 1009, 83 S. E. 424.

[7] Farmers' Bank v. Reynolds, 4 Rand. (Va.) 186.

[8] West v. Ferguson, 16 Gratt. (Va.) 270, 271; Roberts v. Paul, 50 W. Va. 528, 40 S. E. 470; Bice v. Boothsville Telephone Co., 62 W. Va. 521, 59 S. E. 501, 125 Am. St. Rep. 986; Armentrout v. Lambert, 83 W. Va. 569, 98 S. E. 731.

[9] Magarity v. Shipman, 82 Va. 784, 1 S. E. 109; Jones v. Mason, 5 Rand. (Va.) 577; Supreme Council v. Nidelet, 85 Mo. App. 283; McAfee v. McAfee, 28 S. C. 218, 5 S. E. 593; Geddes v. Jones, 40 S. C. 402, 19 S. E. 9; Goodloe v. Woods, 115 Va. 540, 80 S. E. 108.

"Extraordinary costs, such as allowances of expenses and compensation of receivers, either as be-

to the party who substantially prevails.[10] It is provided by statute that upon any motion other than for a judgment for money, or upon any interlocutory order or proceeding, the court may give or refuse costs, at its discretion, unless otherwise provided.[11] There is also a rule, often used by a court of equity for its guidance in the adjustment of costs, that where plaintiff and defendant assert claims which are not sustained, though each succeeds in part, the court may decree that each party pay his own costs.[12]

§ 889. Costs upon the abandonment or dismissal of a suit.

Where a party institutes a suit and afterwards abandons or dismisses it, he will be liable for the payment of the costs.[13] And where the suit is dismissed by the court because of the plaintiff's neglect or failure to prosecute it, costs will usually be decreed against the plaintiff.[14] Under this principle, it seems that costs should be given upon a discontinuance of a cause under the "four-year rule," now the "two-year rule" in West Virginia.[15]

tween the receiver and the fund in court and parties, or as between party and party, are not discretionary, and a decree respecting such costs is appealable." Nutter v. Brown, 58 W. Va. 237, 52 S. E. 88, 1 L. R. A. (N.S.) 1083. See Castle v. Castle, 69 W. Va. 400, 71 S. E. 385.

[10] Allen v. Shriver, 81 Va. 174; Ashby v. Smith, 1 Rob. (Va.) 55; Bryan v. Salyards, 3 Gratt. (Va.) 188; Vann v. Newsom, 110 N. C. 122, 14 S. E. 519; Cooper v. Daugherty, 85 Va. 343, 7 S. E. 387; George v. Everhart, 57 Wis. 397, 15 N. W. 387; Ellis v. Whittier, 37 Me. 548; Booth v. Smith, 5 Wend. (N. Y.) 107, 10 L. Ed. 788; Harman v. Moss, 121 Va. 399, 93 S. E. 609.

[11] W. Va. Code, 1913, c. 138, § 4; Va. Code, 1904, § 3541. See Bice v. Boothsville Telephone Co., 62 W. Va. 521, 59 S. E. 501, 125 Am. St. Rep. 986.

[12] Beverley v. Brooke, 4 Gratt. (Va.) 187; Zane v. Zane, 6 Munf. (Va.) 417; Tabb v. Boyd, 4 Call (Va.) 461; Jackson v. Cutright, 5 Munf. (Va.) 321.

[13] Van Vrankin v. Roberts, 7 Del. Ch. 16, 29 Atl. 1044; Harding v. Downs, 110 Mass. 56; Gilbreth v. Brown, 15 Mass. 178; Duncan v. Veal, 49 Tex. 603; Sherman v. Joslin, 52 Mich. 474, 18 N. W. 224; Warman v. Herndon, 81 W. Va. 574, 94 S. E. 977.

But no costs can be decreed when the parties agree that the suit shall be dismissed without costs. Castle v. Castle, 69 W. Va. 400, 71 S. E. 385.

[14] Reeve v. Eft, 31 N. J. L. 139; Anderson v. McKinney, 22 Tex. 653; State v. Engle, 127 Ind. 457, 26 N. E. 1077, 2 Am. St. Rep. 655; W. Va. Code, 1913, c. 125, § 6; Va. Code, 1904, § 3240.

[15] W. Va. Code, 1913, c. 127, § 8; Va. Code, 1904, § 3312. By Acts of 1921, c. 66, the time has been changed to two years in West Virginia. In Virginia, if there has been no order but that of a continuance for five

§ 890. Costs with reference to pleas in abatement.

It is expressly provided by statute that, if a demurrer to a plea in abatement be sustained, the court may award full costs to the plaintiff up to the time of sustaining such demurrer, and when any part of the proceedings is adjudged insufficient, order all costs occasioned by such insufficient pleading to be paid by him who committed the fault.[16] Where a judgment or decree is rendered on a plea in abatement, in favor of the defendant, he is entitled to his costs;[17] but where an action or suit is abated by the death of either party, and is not revived or revivable, no costs will be awarded.[18] When two suits are brought for the same cause, it "sometimes happens, however, that the second bill embraces the whole subject in dispute more completely than the first; in such cases the practice appears to be to dismiss the first bill with costs, and to direct the defendants in the second cause to answer, upon being paid the costs of a plea allowed, which puts the case upon the second bill in the same situation that it would have been if the first bill had been dismissed before the filing of the second."[19]

If the suit goes off by abatement through the death of the plaintiff or defendant, no decree for costs will be rendered.[20]

§ 891. Costs in cases of amendment.

If the plaintiff amends his bill after the answer has been filed, or at the hearing of the cause, it is usually permitted at his costs.[21] But, as in other cases in equity, the costs of amend-

years, the cause may be discontinued by the court.

[16] W. Va. Code, 1913, c. 138, § 4; Va. Code, 1904, § 3541.

[17] Hyde v. Cole, 1 Iowa 106; Shaw v. Dutcher, 19 Wend. (N. Y.) 216, 13 L. Ed. 585; Thomas v. White, 12 Mass. 370.

[18] Travis v. Waters, 12 Johns. (N. Y.) 500, 5 L. Ed. 479; Brown v. Rainor, 108 N. C. 204, 12 S. E. 1028; Farrier v. Cairns, 5 Ohio 45.

[19] 1 Bart., Ch. Pr. (2nd Ed.), 392.

[20] Brown v. Rainor, 108 N. C. 204, 12 S. E. 1028.

[21] Beekman v. Waters, 3 Johns. Ch. (N. Y.) 410, 1 L. Ed. 666; Horn v. Clements, (N. J. 1887), 8 Atl. 530; Jennings v. Springs, Bailey, Eq. (S. C.) 181; Mt. Olivet

ments are in the court's discretion.[22] And if the amended bill filed in the clerk's office in vacation, as authorized by statute in *West Virginia,*[23] has been improperly filed, it will be dismissed at the costs of the plaintiff.[24]

§ 892. Costs on bills of discovery.

As a general rule, a party who has fully answered a pure bill of discovery [25] is entitled to costs; and costs are given as a matter of course, if the matters alleged in the bill upon which a right of discovery depends are denied by the defendant in his answer.[26] If the plaintiff would protect himself against costs

Cemetery Co. v. Budeke, 2 Tenn. Ch. 480; French v. Shotwell, 4 Johns. Ch. (N. Y.) 505, 1 L. Ed. 917; Neale v. Neales, 9 Wall. (U. S.) 1, 19 L. Ed. 590; Booth v. Wiley, 102 Ill. 84.

"Where a plaintiff asked for further time to except to the answer, which was granted; and also for leave to amend his bill, after such answer, and after a plea accompanying it, but not noticed for argument; the plaintiff, on being allowed to amend his bill, was ordered to pay $5 for the extra costs of the further answer, and the taxable costs of the plea, in case it should become useless in consequence of the bill being amended." French v. Shotwell, *supra.*

"Where a demurrer is allowed on account of a mere formal defect in the bill, it is a matter of course, except in the case of a sworn bill, to permit the complainant to amend, upon payment of costs, where he asks for that privilege upon the argument of the demurrer." Cunningham v. Pell, 6 Paige Ch. (N. Y.) 655, 3 L. Ed. 1141.

"Where an amendment to a petition, stating a cause of action within the jurisdiction of the court, only changes the original by omitting a part of the amount claimed therein, it was an abuse of discretion to tax all the costs up to the time of the filing of the original petition to plaintiff." Watson v. Boswell, 25 Tex. Civ. App. 379, 61 S. W. 407.

[22] Sheets v. Selden, 7 Wall. (U. S.) 416; W. Va. Code, 1913, c. 125, § 12.

[23] *Ante,* § 357.

[24] W. Va. Code, 1913, c. 125, § 12; Baylor v. B. & O. R. R. Co., 9 W. Va. 270; Henry v. Davis, 13 W. Va. 230; Harmison v. Loneberger, 11 W. Va. 175; Norris v. Lemen, 28 W. Va. 336; Anderson v. Kanawha Coal Co., 12 W. Va. 526; Hinton v. Ellis, 27 W. Va. 422.

[25] As to what constitutes a pure bill of discovery, *vide ante,* § 174.

[26] King v. Clark, 3 Paige Ch. (N. Y.) 76, 3 L. Ed. 64; Deas v. Harvie, 2 Barb. Ch. (N. Y.) 448, 5 L. Ed. 710; Burnett v. Sanders, 4 Johns. Ch. (N. Y.) 503, 1 L. Ed. 917.

on a bill of discovery, he must apply to the defendant in the first place to give him the desired information, or to admit the facts of which a discovery is sought; and such application should be set out in the bill. In that case, if the defendant admits the facts stated in the bill, and that he refused to give the desired information, without showing any sufficient excuse for such refusal, he will not be entitled to costs.[27] And if the officer of a corporation is made a defendant for the mere purpose of discovery, he is also entitled to his costs, though the plaintiff, in some cases, may be entitled to a decree over against the corporation for costs necessarily paid to such officer.[28]

A defendant is not entitled to his costs upon answering, when the bill is filed for relief as well as discovery.[29]

§ 893. Costs in suits for divorce and alimony.

It is provided by statute in the *Virginias* that, in a suit for a divorce, costs may be awarded to either party, as equity and justice may require.[30] In cases of this character, it has been

[27] See same citations.

In Deas v. Harvie, *supra*, the court decides that "where no application for a discovery is made to the defendant himself, previous to filing a bill of discovery against him, and the only application made is to his attorney, who has no information on the subject except what he has communicated to the complainant's attorney, it is not sufficient to excuse the complainant in the bill of discovery from the payment of costs.

"Where a defendant in a suit at law applies to the attorney of the plaintiff for a discovery, he should at least state to the attorney the material fact which he wishes his client to admit, to save the necessity of a bill of discovery; and if the attorney does not possess the information necessary to enable him to make the admission, the defendant should request him to communicate with his client and obtain such admission from him, and should then wait a reasonable time to enable the attorney to obtain such admission from his client."

[28] Fulton Bank v. New York, etc., Canal Co., 4 Paige Ch. (N. Y.) 131, 3 L. Ed. 372.

[29] McDougall v. Miln, 2 Paige Ch. (N. Y.) 325, 2 L. Ed. 928.

[30] W. Va. Code, 1916, c. 64, § 8; Va. Code, 1904, § 2260.

The West Virginia statute further provides, by virtue of Acts of 1915, c. 73, that "in all cases the court, in its discretion, may require payment of the costs at any time, and may suspend or withhold any order or decree until the costs are paid." W. Va. Code, 1916, c. 64, § 8; Acts 1915, c. 73.

held that the general rule is followed and costs are awarded to the prevailing party.[31] But inasmuch as the matter of costs lies entirely in the discretion of the court, the courts are strongly inclined, as shown by the decisions, to decree costs against the husband, even in those cases wherein he prevails.[32] Thus, it is proper for a decree in favor of a husband, granting a divorce *a mensa et thoro* from the wife, to provide that he shall pay the costs of the suit, where he had been rude and dictatorial in his speech, unkind and negligent in his treatment, and there is no other act of misconduct on her part than desertion not upon legal grounds.[33] There are many cases which hold that the husband is liable for reasonable fees to the wife's attorney for his services in prosecuting a suit for the wife against the husband for a divorce, upon proper grounds, and in which she succeeds in obtaining a decree of divorce.[34]

The court will not, however, award costs against the husband where, from the face of the bill, or otherwise, it appears that

[31] Williamson v. Williamson, 1 Johns. Ch. (N. Y.) 488, 1 L. Ed. 218; Graves v. Graves, 2 Paige Ch. (N. Y.) 62, 2 L. Ed. 813; Germond v. Germond, 1 Paige Ch. (N. Y.) 83, 2 L. Ed. 570; Robinson v. Robinson, 79 Cal. 511, 21 Pac. 1095.

[32] De Rose v. De Rose, Hopk. Ch. (N. Y.) 100, 101, 2 L. Ed. 357; Wood v. Wood, 2 Paige Ch. (N. Y.) 454, 2 L. Ed. 986; Phelan v. Phelan, 12 Fla. 458; Richardson v. Richardson, 4 Port. (Ala.) 467, 30 Am. Dec. 538; Reavis v. Reavis, 2 (1 Scam.) Ill. 242; Thatcher v. Thatcher, 17 Ill. 66; Sumner v. Sumner, 54 Wis. 642, 12 N. W. 21.

In De Rose v. De Rose, *supra*, the court in its opinion says: "No costs are allowed in this case. In the converse case of a bill by a wife against the husband, costs may be allowed. But where the wife is defendant, she is presumed to be left destitute of means to pay costs; and it seems cruel to give them against her, though the offending party. If it appeared that she had separate property, the case might be different."

[33] Carr v. Carr, 22 Gratt. (Va.) 168.

[34] Doolittle v. Doolittle, 78 Iowa 691, 6 L. R. A. 187, 43 N. W. 616; Bueter v. Bueter, 1 S. D. 94, 8 L. R. A. 562, 566, 45 N. W. 208; Graves v. Graves, 36 Iowa 310, 14 Am. Rep. 525; extended note to Wolcott v. Patterson, 24 L. R. A. 629 *et seq.*, and authorities cited in brief of counsel therein; W. Va. Code, 1916, c. 64, § 9; Va. Code, 1904, § 2261; Goff v. Goff, 54 W. Va. 364, 46 S. E. 177; Kiser v. Kiser, 108 Va. 730, 62 S. E. 936; Craig v. Craig, 115 Va. 764, 80 S. E. 507.

the wife can not obtain a decree, and the wife has not shown any marital injury or meritorious cause of suit.[35]

§ 894. Costs in suits by and against fiduciaries.

When a judgment or decree is rendered against a person acting in a fiduciary character, its payment is ordinarily directed to be made out of the personal estate belonging to the trust estate which is in, or shall come to, the hands of such fiduciary to be administered.[36] But when the court enters of record that, if the fiduciary had prudently discharged his duty the suit would not have been brought, a decree for costs will be entered to be paid out of his own property.[37] But such a certificate, it is said, is not always necessary in order that a personal decree for costs may be rendered.[38] Thus, where there were two conflicting trusts and the fund was decreed to one to the exclusion of the other, the excluded trustee resisting the plaintiff's claim, and failing in his defense, was decreed to pay the costs *de bonis propriis*.[39]

It may be laid down as a safe and general rule that, where a fiduciary, such as a personal representative, guardian, committee of an insane person, or other trustee, acts in good faith in the prosecution or defense of a matter relating to his trust, the costs will be paid out of the trust estate;[40] but if such

[35] Wood v. Wood, 2 Paige Ch. (N. Y.) 454, 2 L. Ed. 986; Krause v. Krause, 23 Wis. 356; Rose v. Rose, 11 Paige Ch. (N. Y.) 166, 5 L. Ed. 93; Phelan v. Phelan, 12 Fla. 458; Wagner v. Wagner, 34 Minn. 443, 26 N. W. 450.

[36] W. Va. Code, 1913, c. 131, § 20; Va. Code, 1904, § 2677.

[37] See same citations.

[38] 2 Bart., Ch. Pr. (2nd Ed.), 876.

[39] *Idem*, citing Beverley v. Brooke, 4 Gratt. (Va.) 231. This case can not be used as a fair illustration, inasmuch as it was a contention between two rival claimants of the fund, in which the defeated claimant was also interested as a *cestui que trust*.

[40] Alexander v. Alexander, 5 Ala. 517; Mathes v. Bennett, 21 N. H. 204; Sorrel v. Proctor, 4 H. and M. (Va.) 431; Morse v. McCoy, 4 Cow. (N. Y.) 551, 8 L. Ed. 484; Phoenix v. Hill, 3 Johns. (N. Y.) 249, 3 L. Ed. 594; Moses v. Murgatroyd, 1 Johns. Ch. (N. Y.) 473, 1 L. Ed. 213, and note; Decker v. Miller, 2 Paige Ch. (N. Y.) 149, 2 L. Ed. 851; Eidson v. Fontaine, 9 Gratt. (Va.) 286; Robertson v.

fiduciary institute or resist a suit in bad faith and do not succeed, or the litigation concern his own personal interests alone, he will be charged individually with the costs.[41] Thus, if such fiduciary bring a groundless or vexatious suit, he will be re-

Gillenwaters, 85 Va. 116, 7 S. E. 371; Turk v. Hevener, 49 W. Va. 204, 38 S. E. 476; Long v. Israel, 9 Leigh (Va.) 556; Anderson v. Piercy, 20 W. Va. 340, 341.

"An administrator or trustee, who resists a claim and litigates *bona fide* from a conviction of duty, and where no intentional default is made to appear, will not, under the circumstances of the case, be charged personally with the costs; but they must be paid out of the assets of the intestate." Moses v. Murgatroyd, *supra.*

"Where such executor has a right to ask the aid and protection of the court in paying over the debt due by him to the testator, he will be entitled to his costs out of the fund." Decker v. Miller, *supra.*

"So, if the executor who was the creditor of the estate had a right of preference over other creditors, and was compelled to come into chancery to obtain such preference, his costs will be paid out of the fund." *Idem.*

"Representing the personal estate, the executor or administrator, under his oath and duty, may defend a large claim set up against the estate, a litigable claim, not clearly valid; and unless it is clearly shown that he acted badly, was guilty of improper action, he ought to be credited with legal costs and reasonable counsel fees. He would be allowed them in the circuit court, and I see no reason why he might not *bona fide,* and under the advice of counsel, carry the case into an appellate court, and be allowed his costs. True, he would not be compelled to appeal for his own protection, but in the exercise of a reasonable discretion for the interests of the estate, he might of his own motion, and more clearly still at the instance of interested parties, seek a reversal in a higher court. The commissioner says that the liability was for a *devistavit* by David McGlaughlin. That is no difference. It was a demand against his estate which Hevener litigated. Unless it be clearly shown that Hevener's contestation of the claim was mismanagement and misconduct, he should be allowed legal costs and reasonable counsel fees and other charges incident to the appeal." Turk v. Hevener, *supra.*

"An administrator is allowed his legal costs and reasonable counsel fees expended in defending a litigable demand against the estate, whether in the circuit or appellate court, if he acted in good faith in making such a defense." *Idem.*

[41] Moyer v. Swygart, 125 Ill. 262, 17 N. E. 450; Morse v. McCoy, 4 Cow. (N. Y.) 551, 8 L. Ed. 484; Shepherd v. McClain, 18 N. J. Eq. 128; Sorrel v. Proctor, 4 H. and M. (Va.) 431.

If the good or bad faith of an executor in instituting a suit is not clear, it seems that the court will give him the benefit of the doubt, and award costs out of the estate. Shepherd v. McClain, *supra.*

quired to pay the costs.[42] It ought affirmatively to appear, and be entered of record, that the fiduciary has failed to do his duty in the particular case, in order to make him personally liable for costs.[43]

§ 895. Costs in matters of garnishment.

If it be suggested that a garnishee has not fully answered, and the question as to whether or not he has fully answered be litigated and the issue be found against such garnishee, he will be required to pay the costs; but if the issue be found in his favor, costs will be awarded to him.[44] But "inasmuch as a garnishee occupies an unsought and often an unwilling position in the suit, and since he stands aloof from any activity in the proceedings, occupying the position of a stakeholder indifferent to both parties, the policy of the courts is to hold him harmless, and will not tax costs against him where he is not at fault, not even where he has suffered default, if he has made no active opposition."[45] "Costs will be awarded to the garnishee for attorney's fees in preparing his answer where he is discharged upon his answer, or where his answer is controverted and on the trial of the issue it is found that he is not liable to any greater extent than he had first admitted in his answer."[46] "And where he has incurred the expense of counsel fees for the purpose of upholding the true answer, the same may be included in the costs taxed against the plaintiff."[47]

[42] Getman v. Beardsley, 2 Johns. Ch. (N. Y.) 274, 1 L. Ed. 376, note, citing Roosevelt v. Ellithorp, 10 Paige (N. Y.) 418; Howland v. Green, 108 Mass. 283.

[43] Harrison v. Warner, 1 Blackf. (Ind.) 385; Clark v. Wright, 26 S. C. 196, 1 S. E. 814; Knox v. Bigelow, 15 Wis. 415; Wiesmann v. Brighton, 83 Wis. 550, 53 N. W. 911; Ladd v. Anderson, 58 Wis. 591, 17 N. W. 320; Hei v. Heller, 53 Wis. 415, 10 N. W. 620; Moses v. Murgatroyd, 1 Johns. Ch. (N. Y.) 473, 1 L. Ed. 213; Sugg v. Bernard, 122 N. C. 155, 29 S. E. 221.

[44] W. Va. Code, 1913, c. 106, § 16; Va. Code, 1904, § 2978; Wagon Co. v. Peterson, 27 W. Va. 314; 2 Shinn, Attachment and Garnishment, § 663.

[45] 2 Shinn, Attachm. and Garnish., § 698.

[46] *Idem*, citing Conant v. Burns, 66 N. H. 99, 19 Atl. 11; Walker v. Wallace, 2 Dall. (U. S.) 113, 1 L. Ed. 311; Vandusen v. Schrader, 14 Phila. (Pa.) 132.

[47] *Idem.*

§ 896. Costs in suits by and against infants.

Inasmuch as an infant must sue by his next friend,[48] who ought to be a person of substance,[49] as a general rule, in a suit prosecuted by a next friend of an infant, the infant is not primarily liable for costs if the suit should go against him,[50] but the costs must be borne in the first instance by the next friend.[51] And the same rule governs as to suits brought by an insane person who has had no committee appointed for him.[52] But if the suit be brought against the infant, as a general rule, he is personally liable for costs, if the suit should be decided against him.[53]

§ 897. Costs in injunction suits.

It is a general rule of a court of equity that, if an injunction be perpetuated at the hearing as to any part of the relief

[48] *Ante*, § 55.

[49] 1 Bart., Ch. Pr. (2nd Ed.), 193, citing Burwell v. Corbin, 1 Rand. (Va.) 151, 10 Am. Dec. 494.

[50] Albee v. Winterink, 55 Iowa 184, 7 N. W. 497; Klaus v. State, 54 Miss. 644; Waring v. Crane, 2 Paige (N. Y.) 79, 2 L. Ed. 821, and note.

[51] Burwell v. Corbin, 1 Rand. (Va.) 151, 10 Am. Dec. 494; Waring v. Crane, 2 Paige Ch. (N. Y.) 79, 2 L. Ed. 821.

In this case the court decides: "Where the suit is terminated before the infant becomes of age, the next friend will be chargeable with the costs, unless there be a fund belonging to the infant, under the control of the court, and it appears that the suit was brought in good faith and with a *bona fide* intent to benefit the infant; in which case the court may direct the costs to be paid out of the fund."

[52] Nance v. Stockburger, 112 Ga. 90, 37 S. E. 125.

In this case, the following points are decided: "Where an action is instituted in behalf of an alleged imbecile by persons designating themselves as his next friends, they are, upon an adverse termination of the case, primarily liable for the costs, and his estate is liable to them for the amount thereof if he was in fact an imbecile and the action was brought in good faith.

"When, therefore, such an action was brought and voluntarily dismissed by the next friends, it was, in the absence of any evidence either as to the fact of imbecility or as to *bona fides* in instituting the suit, erroneous to tax the costs against the alleged imbecile and enter judgment against him for the same. If he was not an imbecile when the petition was filed, it was wrongfully brought, and if he was, the above stated rule as to costs was applicable."

[53] Myers v. Rehkopf, 30 Ill. App. 209; Perryman v. Burgster, 6 Port.

sought or sum enjoined, a decree will be rendered for the payment of the complainant's costs.[54] So, where a purchaser comes into a court of equity to enjoin a judgment for the purchase money of land on the ground of a defect of title, and the title is perfected after suit brought, the plaintiff is, nevertheless, entitled to costs.[55] If a plaintiff properly comes into a court of equity to enjoin a judgment on account of defects in the title of land for the purchase of which the debt was contracted, he is entitled, upon the removal of the objections, to have his costs. If, however, he has another case pending where the same questions are involved, and where he could have had the relief asked for by a proceeding in that case, he will not be allowed his costs.[56]

In all cases of a pure bill of injunction,[57] where the injunction is dissolved and the bill dismissed, the defendant is entitled to his costs.[58] But on an interlocutory order or decree overruling or sustaining a motion to dissolve an injunction, costs

(Ala.) 99; Gardiner v. Holt, 2 Strange 1217, citing Dyer 104, 1 Bulst, 189; Bryant v. Livemore, 20 Minn. 313.

[54] Degraffenried v. Donald, 2 H. and M. (Va.) 10; Ross v. Gordon, 2 Munf. (Va.) 289; Donally v. Ginatt, 5 Leigh (Va.) 359; Defarges v. Lipscomb, 2 Munf. (Va.) 451; Shipman v. Fletcher, 95 Va. 585, 29 S. E. 325.

Where an injunction against a judgment at law is perpetuated in part, being the amount of just discounts claimed by the plaintiff in equity of which he might have availed himself at law if he had made defense, and is dissolved as to the residue, it is proper for the chancellor to decree that the plaintiff in equity shall pay the defendant there his costs. Donally v. Ginatt, *supra*.

[55] Reeves v. Dickey, 10 Gratt. (Va.) 138.

[56] Young v. McClung, 9 Gratt. (Va.) 336.

[57] As to what is a pure bill of injunction, *vide ante*, § 728.

[58] Rowton v. Rowton, 1 H. and M. (Va.) 110; Byrne v. Lyle, 1 H. and M. (Va.) 7; Baldwin v. Darst, 3 Gratt. (Va.) 132.

Where there is an injunction to a judgment against two or more persons, and only one signs the injunction bond or applies for the injunction, upon dissolution there should not be an award of execution for damages and costs against all the judgment debtors, but only against those signing the bond or asking the injunction. Graham v. Citizens' National Bank, 45 W. Va. 701, 32 S. E. 245.

should not be decreed, but only on a final decree in such a case.[59]

§ 898. Costs as to the enforcement of mortgage and other liens.

As a general rule, the costs of foreclosure or sale under a mortgage are awarded to the plaintiff, payable out of the proceeds of the sale of the mortgaged property.[60] But if such proceeds are insufficient to pay the mortgage debt, the mortgagor is personally liable for the costs.[61] If the mortgagee brings an action at law upon the note secured by the mortgage and obtains a judgment thereon, he is entitled to the payment of the costs incurred at law as a part of the mortgage debt.[62] In the enforcement of liens in a general creditors' suit, the plaintiffs are entitled to their costs upon like principles applying in the case of mortgages;[63] and even where there are several creditors who have several claims against the same debtor, each is entitled to a decree for his separate costs, though the causes are heard together.[64] But if a creditor, with knowledge that there has been a decree for an account entered in another creditors' suit, brings a separate suit upon his own claim, he will be required to pay the costs of such latter suit.[65]

[59] Barnett v. Spencer, 2 H. and M. (Va.) 7.

[60] Beverly v. Brooke, 4 Gratt. (Va.) at p. 231; Botsford v. Botsford, 49 Mich. 29, 12 N. W. 897.

"Upon a bill by a mortgagor to redeem, the costs of the suit are to be decreed against him, unless he establishes a prior tender of the amount due on the mortgage." Liskey v. Snyder, 56 W. Va. 610, 49 S. E. 515.

[61] Jones v. Phelps, 2 Barb. Ch. (N. Y.) 440, 5 L. Ed. 707.

[62] Pettibone v. Stevens, 15 Conn. 19, 38 Am. Dec. 57.

[63] Barger v. Buckland, 28 Gratt. (Va.) 850; Umbarger v. Watts, 25 Gratt. (Va.) 167; Bank v. Manoni, 76 Va. 802; Gurnee v. Bansemer, 80 Va. 867.

"When the property is sold under decree of court to satisfy liens thereon, out of the proceeds must be paid the taxed costs, but not more than the legal fee to the plaintiff's counsel. If an allowance beyond the usual fee, for counsel representing the creditors, be proper, and it be paid out of the proceeds, it should be credited ratably on the liens, so as not to tax the debtor with it." Bank v. Manoni, *supra*.

[64] Barger v. Buckland, 28 Gratt. (Va.) 850; Umbarger v. Watts, 25 Gratt. (Va.) 167.

[65] Stephenson v. Taverners, 9 Gratt. (Va.) 398; Kent v. Cloyd,

§ 899. Costs in partition suits.

The costs of a suit for the partition of property should be borne equally by the parties to whom the land belongs, where all the parties to the suit are equal owners;[66] or where the ownership of the property is unequal, each party should pay such a share of the costs as his share of the property bears to the whole of it.[67]

§ 900. Costs in cases of specific performance.

In cases of specific performance costs, in accordance with the rule generally obtaining in equity, as we have seen,[68] are decreed to the party substantially prevailing.[69] But this rule does not apply where the suit is brought against the heirs at law of the vendor, who are under age, and therefore incapable of making conveyance of title.[70] And where the defendant is not in default when suit is brought, he is entitled to his costs, although the plaintiff obtains relief.[71]

§ 901. Costs in the case of trusts and trustees.

In addition to what has been said as to costs with reference to fiduciaries,[72] which necessarily includes trustees, we may add, by way of more specific consideration of the subject, that where suit is brought for the removal of a trustee and the removal is made because of his own fault or misconduct, he

30 Gratt. (Va.) 555; Laidley v. Kline, 23 W. Va. 565; Bilmyer v. Sherman, 23 W. Va. 656.

"If several suits are pending by different creditors, the court will order the proceedings in all the suits but one to be stayed, and will require the several parties to come in under the decree in said suit, so that only one account of the estate may be necessary." Stephenson v. Taverners, *supra*.

66 Askey v. Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176. But see Cresap v. Brown, 82 W. Va. 467, 96 S. E. 66.

67 Young v. Edwards, 33 S. C. 404, 11 S. E. 1066, 10 L. R. A. 55; Mort v. Jones, 105 Va. 668, 51 S. E. 220, 54 S. E. 857; McCoy v. McCoy, 105 Va. 829, 54 S. E. 995.

68 *Ante*, § 888.

69 Woods v. Stevenson, 43 W. Va. 149, 27 S. E. 309; Hobson v. Buchanan, 96 N. C. 444, 2 S. E. 180.

70 Pennington v. Hanby, 4 Munf. (Va.) 144; Dyer v. Potter, 2 Johns. Ch. (N. Y.) 152, 1 L. Ed. 328.

71 Peers v. Barnett, 12 Gratt. (Va.) 410.

72 *Ante*, § 894.

will be charged personally with the costs of the proceeding;[73] otherwise, the costs will be paid out of the trust estate.[74] So, where a trustee files a bill for instructions of the court touching his duties in a case of doubt or difficulty, the costs will be paid out of the trust estate,[75] but to be charged to the particular trust fund with reference to which the directions were necessary.[76] And the trustee is entitled to reasonable counsel fees to be allowed out of the trust estate for services rendered in the institution and prosecution of the suit for the purpose of obtaining the court's instructions.[77]

§ 902. Costs in the construction or contest of wills.

As already stated,[78] the matter of costs rests in the discretion of a court of equity; and this principle applies, of course, to suits brought to construe wills. But while this is the case, courts exercise their discretion in accordance with repeated decisions, which declare that where suit is brought for the construction of a will, rendered necessary by the ambiguous manner in which the testator has expressed his intention in his will, the costs of all parties will be decreed to be paid out of the estate or fund in controversy;[79] unless the suit be unneces-

[73] *In re* Carter, 3 Paige Ch. (N. Y.) 146, 3 L. Ed. 92.

[74] Bloomer's Appeal, 83 Pa. St. 45; Sutphen v. Fowler, 9 Paige Ch. (N. Y.) 280, 4 L. Ed. 700, 701.

[75] Mandell v. Green, 108 Mass. 283; Trotter v. Blocker, 6 Port. (Ala.) 269; McLean v. Freeman, 70 N. Y. 81; Rogers v. Ross, 4 Johns. Ch. (N. Y.) 608, 1 L. Ed. 953.

[76] Jones v. Stockett, 2 Bland. (Md.) 409; Leech v. Leech, 1 Ch. Cas. 249.

[77] *In re* Holden, 126 N. Y. 589, 27 N. E. 1063; Goldtree v. Thompson, 83 Cal. 420, 23 Pac. 383; Grimball v. Cruse, 70 Ala. 534.

See Cochran v. Richmond & A. R. Co., 91 Va. 339, 21 S. E. 664; Underhill, Trusts and Trustees (1st Am. Ed.), 428, note 1.

[78] *Ante*, § 888.

[79] Ingraham v. Ingraham, 169 Ill. 432, 48 N. E. 561; Woman's Union Missionary Soc. v. Mead, 131 Ill. 33, 23 N. E. 603; Arnold v. Alden, 173 Ill. 229, 50 N. E. 704; Howard v. Smith, 78 Iowa 73, 42 N. W. 585; Moore v. Alden, 80 Me. 301, 14 Atl. 199, 6 Am. St. Rep. 203; Tracy v. Murray, 44 Mich. 109, 6 N. W. 224; Smith v. Smith, 4 Paige Ch. (N. Y.) 271, 3 L. Ed. 432, and note; Wood v. Vandenburgh, 6 Paige Ch. (N. Y.) 277, 3 L. Ed. 985.

In Smith v. Smith, *supra*, the court said: "As a general rule, if the testator has expressed his in-

sary, or prematurely brought, or not instituted in good faith, when the plaintiff will be required to pay them.[80]

In suits to establish lost or destroyed wills, the costs may be charged to the estate,[81] though where the proceedings are resisted, it is proper to decree costs against the defendants, as was done in *Dower* v. *Seeds*,[82] or where it is destroyed by a party in interest, such party being a defendant to the suit.[83] It is said by a recent learned author[84] that "the theory of costs in probate and contest proceedings, entertained by most courts, is that in the absence of a statute directing that costs be taxed against the losing party, as in an action at law, the court has the same discretionary power as in equity cases to tax costs according to right and to the equities of the case."[85] The author just cited, continuing, says: "Courts which entertain this view of their power over costs may allow to the executor his costs for successfully defending the will, to be paid out of the funds of the estate in his hands, while if the executor exerted undue influence over testator, whereby he induced him

tention so ambiguously as to create a difficulty which makes it necessary to come into the court of chancery to give a construction to the will, or to remove the difficulty, the costs of the litigation must be borne by his estate. And the general residue is the primary fund for the payment of such costs," citing Joliffe v. East, 3 Brown Ch. 27; Barrington v. Tristram, 6 Ves. 349; Pearson v. Pearson, 1 Schoales and L. 12; Studholme v. Hodgson, 3 P. Wms. 302. See Straw v. Trustees, 67 Me. 495.

[80] Dane v. Walker, 109 Mass. 179; Rexroad v. Wells, 13 W. Va. 812; Garlock v. Vandevort, 128 N. Y. 379, 28 N. E. 599; Baxter v. Baxter, 43 N. J. Eq. 82, 10 Atl. 814.

[81] Thornton on Lost Wills, § 130; Wyckoff v. Wyckoff, 16 N. J. Eq. 401; Buchanan v. Matlock, 8 Humph. (Tenn.) 390, 47 Am. Dec. 622.

[82] 28 W. Va. 113-158.

[83] Thornton on Lost Wills, § 130.

[84] Page on Wills, § 344.

[85] The author cites in support of this principle the following cases: McKinney's Estate, 112 Cal. 447, 44 Pac. 743 (this rule is enacted into a statute in California); Shaw v. Camp, 56 Ill. App. 23, affirmed, 163 Ill. 144, 45 N. E. 211, 36 L. R. A. 112; Wilbur v. Wilbur, 138 Ill. 446, 27 N. E. 701; Alvord v. Stone, 78 Me. 296, 4 Atl. 697; Wallace v. Sheldon, 56 Neb. 55, 76 N. W. 418; McClary v. Stull, 44 Neb. 175, 62 N. W. 501; Mayo v. Jones, 78 N. Car. 402; Jones v. Roberts, 96 Wis. 427, 70 N. W. 685, 71 N. W. 883; Gorkow's Estate, 20 Wash. 563, 56 Pac. 385.

to make the will in litigation, costs may be awarded against such executor upon a judgment adverse to the will. A defeated contestant, who has carried on litigation in good faith, and upon reasonable cause for appeal, may have his costs paid out of the estate. So where one who is named in a will as executor and legatee offers a will for probate and fails, the court may in its discretion allow him his costs, and such allowance is not made invalid by the fact that at the time of such allowance there was no administrator of such estate." [86] In the absence of special reasons for directing the payment of costs out of the estate, the courts, in the furtherance of justice, often compel the unsuccessful proponent of the will to pay the costs of the contest, applying also the same rule to defeated contestants.[87] It seems to us that the safe rule to apply is to allow the executor as the proponent of the will his costs, when there is no evidence of bad faith on his part.[88]

§ 903. Jurisdiction of the court as affecting the matter of costs.

There is a long array of authorities holding that, where the court has no jurisdiction of the cause, and dismisses the case accordingly, costs can not be awarded to either party, in the absence of a statute so providing, the reason assigned being that the court has no more jurisdiction to award costs than to grant relief; [89] while on the other hand, there are a great many

[86] Page on Wills, § 344; Bowen's Exr. v. Bowen, 122 Va. 1, 94 S. E. 166.

[87] See same citations.

[88] Roy v. Roy, 16 Gratt. (Va.) 418, 84 Am. Dec. 696; Baker v. Bancroft, 79 Ga. 672, 5 S. E. 46; *In re* Carman's Will (Iowa), 48 N. W. 985; *In re* Smith's Will, 52 Wis. 543, 9 N. W. 665, 38 Am. Rep. 756; Brilliant v. Simpson, 110 Mich. 68, 67 N. W. 1101; Bowen's Exr. v. Bowen, 122 Va. 1, 94 S. E. 166.

[89] Inglee v. Coolidge, 2 Wheat. (U. S.) 363, 4 L. Ed. 261; Strader v. Graham, 18 How. (U. S.) 602, 15 L. Ed. 464; Mazanger v. Slocum, 23 Ala. 668; Derton v. Boyd, 21 Ark. 264; Williams v. Blunt, 2 Mass. 207; Thomas v. White, 12 Mass. 370; Clark v. Rockwell, 15 Mass. 221; Nichol v. Patterson, 4 Ohio 200; Maxfield v. Levy, 4 Dall. (U. S.) 330, 2 *idem* 381, 1 L. Ed. 424, 854; Banks v. Fowler, 3 Litt. (Ky.) 332; Taul v. Collinsworth, 2 Yerg. (Tenn.) 579; Paine v. Commissioners, Wright, Ohio, 417; Barlow v. Burr, 1 Vt. 488; Green v. Whiting, 9 Miss. (1 Smed. and M.) 579; Hopkins v. Brown, 5 R. I. 357; Norton v. McLeary, 8 Ohio St. 205; Walker v. Snowdon, 1 Swan (Tenn.) 193; Bartels v. Hoey, 3 Colo. 279; Strong v. Meachem, 1 Root (Conn.) 525.

cases holding a contrary doctrine.[90] The reasons for the two rules are set forth in *Kinnear* v. *Flanders*,[91] wherein the court says that the view that judgment for costs may be awarded, though the court be without jurisdiction, "is predicated upon the just and reasonable proposition that he who brings another against his will into a court having no jurisdiction, and thus occasions useless annoyance and expense, should at least suffer the inadequate penalty of payment of the costs." But the contrary rule "is logical. It rests upon the idea that there can be no judgment of any kind where there is no jurisdiction." In *Bush* v. *Campbell*,[92] it is held that, "if a plaintiff, in order to give jurisdiction to the court, in a case where defendants live in another county unites in the action, a party who he knows is no party to the contract, the court will on motion dismiss the suit with costs."

§ 904. Suits by a poor person.

It is provided by statute in *West Virginia* that "a poor person may be allowed by a court to sue or defend a suit therein without paying fees, or costs, whereupon he shall have from all officers all nedful services and process and also the assistance of witnesses, without any fees to them therefor, except what may be included in the costs recoverable from the opposite party."[93] The application to sue as a poor person may be made either before or after the commencement of the suit.[94]

[90] Brown v. Allen, 54 Me. 436; Osgood v. Thurston, 23 Pick. (Mass.) 110; Jordan v. Dennis, 7 Metc. (Mass.) 591; Hunt v. Hanover, 8 *idem* 343; Cumberland, etc., Co. v. Hoffman, etc., Co., 39 Barb. (N. Y.) 16.

See Freer v. Davis, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895; Litz v. Rowe, 117 Va. 752, 86 S. E. 155.

[91] 17 Colo. 11, 28 Pac. 327.

[92] 26 Gratt. (Va.) 403.

[93] W. Va. Code, 1916, c. 138, § 1, as amended by Acts of 1915, c. 83, § 6.

In *Virginia*, "a poor person may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefor, except what may be included in the costs recovered from the opposite party." Va. Code, 1904, § 3538.

The statute does not apply to appellate proceedings. Tyler v. Garrison, 120 Va. 697, 91 S. E. 749. The terms of the statute do not exclude nonresidents. Miller's Admr. v. Norfolk & W. R. Co., 47 Fed. 264.

[94] 16 Enc. Pl. and Pr., 684.

§ 905. Security for costs—When required.

It is prescribed by statute in the *Virginias* that, in any suit, unless the plaintiff be a poor person as mentioned in the next preceding section, "there may be a suggestion on the record in court, or if the case be at rules, on the rule docket, by a defendant or any officer of the court, that the plaintiff is not a resident of this state, and that security is required of him. After sixty days from such suggestion, the suit shall by order of the court be dismissed, unless before the dismission the plaintiff be proved to be a resident of the state, or security be given before said court, or the clerk thereof for payment of the costs which may be awarded to the defendant, and of the fees due, or to become due in such suit, to the officers of the court. The security shall be by bond payable to the state; but there need only be one obligor therein, if he be sufficient. The court before whose clerk such bond is given, may on motion by a defendant or officer, give judgment for so much as he is entitled to by virtue of said bond."[95] Although the statute provides that if the security be not given within the sitxy days after the suggestion is made the suit shall be dismissed, still if the security be tendered in court at the first calling of the case after the sixty days, the cause ought not to be dismissed.[96] The evidence on a motion for security for costs on the question of the plaintiff's nonresidence may be embodied in a bill of exceptions in a court of equity.[97] In *Enos, Hill & Co.* v. *Stansbury*,[98] the court decides that the mere entry of an order that, unless security for costs be given before the clerk within sixty days, the suit will be dismissed, will not itself operate a dismissal of the suit; but that after the expiration of sixty days an order

[95] W. Va. Code, 1913, c. 138, § 2; Va. Code, 1904, § 3539.

[96] Vance v. Bird, 4 Munf. (Va.) 364.

[97] Evans v. Bradshaw, 10 Gratt. (Va.) 207. As to what constitutes nonresidence, *vide* Evans v. Bradshaw, *supra;* Dean v. Cannon, 37 W. Va. 123, 16 S. E. 444.

A resident administrator who brings an action to recover damages for the wrongful death of his decedent, who was a nonresident, is required by this statute to give bond for costs. Richards v. Riverside Iron Works, 56 W. Va. 510, 49 S. E. 437.

[98] 18 W. Va. 477.

must be made dismissing the case for want of security, and until such order is made, the plaintiff has a right to give such security. If, after such order is made requiring security to be given, the case be proceeded with, though the security be not given, and no objection thereto be made by the defendant, it will be presumed that he waived his right to demand security for costs.[99] The suggestion of the nonresidence of the plaintiff and the entry of record of the requirement of security for costs is all that the law requires to impose upon the plaintiff the duty of giving such security. The law does not require any other notice, nor the entry and service of a rule.[100] But the motion to require such security must be made prior to the hearing of the cause. Otherwise, it comes too late and will be overruled.[101]

[99] Hulings v. Jones, 63 W. Va. 696, 60 S. E. 874.

"Where it was shown to the court that the plaintiffs were nonresidents, and security for costs was required, and the court accepted an 'undertaking' instead of a bond, and no objection was made thereto by the defendants, who proceeded to trial, the giving of the 'bond' was waived by them." Rutter v. Sullivan, 25 W. Va. 427.

"Such requirement of security may be waived, and such waiver may be presumed from the conduct of the defendant." Dean v. Cannon, 37 W. Va. 123, 16 S. E. 444.

[100] *Idem.*

[101] Murpby v. Fairweather, 72 W. Va. 14, 77 S. E. 321.

CHAPTER XXXVI

FORMS

CAPTION AND OTHER PARTS OF THE BILL

§ 906. The caption and address of the bill, showing the various capacities in which the plaintiff may sue.

The title.—General form.

When complainant is a married woman.

Where the plaintiff is an infant.

Where complainant is insane, and for whom a committee has been appointed.

Where one creditor sues on his own behalf and that of other creditors, to enforce a judgment lien.

Where a creditor sues on behalf of himself and other creditors to set aside a preference created by the voluntary act of the debtor.

Where a corporation is plaintiff.

Where complainant sues as an administrator.

Where complainant sues as administrator with the will annexed.

Where complainant sues as executor.

Where the complainant sues as special receiver.

Where the plaintiff sues as special commissioner.

Where the plaintiff sues as administrator *de bonis non*.

Where the plaintiffs sue as partners.

Where the plaintiff sues as a surviving partner.

Where the plaintiff sues as a municipal corporation.

§ 907. The introduction of the bill, showing also the different capacities in which a party may sue.

The general form.

A second general form.

A third general form.

Where the complainant is an infant.

Where plaintiff is an infant, second form.

Where plaintiff is an infant, a third form.

Where the complainant is the committee of an insane person.

Where the plaintiff is a private corporation.

Where the plaintiff sues on behalf of himself and all other lien creditors to enforce a judgment.

Where the plaintiff sues to set aside a preference created by the voluntary act of the debtor.

Where the plaintiff sues as administrator.

§ 907. The introduction of the bill, showing also the different capacities in which a party may sue.—*Continued.*
Where plaintiff sues as administrator with the will annexed.
Where plaintiff sues as executor.
Where the plaintiff sues as special receiver.
Where the plaintiff sues as special commissioner.
Where the plaintiff sues as administrator *de bonis non.*
Where the plaintiffs sue as partners.
Where the plaintiff sues as a surviving partner.
Where the plaintiff sues as a municipal corporation.
§ 908. The premises or stating part of the bill.
§ 909. The confederating part of the bill.
§ 910. The charging part of the bill.
§ 911. The jurisdiction clause of the bill.
§ 912. The interrogatory part of the bill.
§ 913. The prayer of the bill for relief.
Another form of prayer for relief.
Prayer for an answer, oath waived—injunction against proceedings at law—declaration of trust—conveyance.
Prayer for an injunction.
Prayer for the production of deeds, papers, etc.
The prayer for process.

§ 906. The caption and address of the bill,[1] showing the various capacities in which the plaintiff may sue.

No. 1.

THE TITLE—GENERAL FORM.

State of ———,
M——— County, to-wit:

[1] As already stated (*ante*, § 103), the practice in *West Virginia* does not require any title or address as a part of the bill, but of course the one prescribed by the general chancery practice, as the one here given, may be used, the practitioner using his discretion as to the extent to which he will abandon the formalities of the more conventional form in favor of the less complicated statutory requirements. While the caption is often used by the pleader in drafting the bill, still it is not necessarily a part of the bill (except when followed in the form prescribed by statute in West Virginia), and may be entirely omitted. Jackson v. Ashton, 8 Peters (U. S.) 148, 8 L. Ed. 898; Spalding v. Dodge, 6 Mackey (17 D. C.) 289. The complaint itself, aside from statute, and not the caption, determines the capacity in which a party is sued. Burling v. Thompkins, 77 Cal. 257, 19 Pac. 429; Wise v. Williams, 72 Cal. 544, 14 Pac. 204. It can not be used to supply defects in the pleading. Jackson v. Ashton, *supra.*

The first part of the bill proper is called the "address." It formerly consisted of the address to the person holding the great seal,

In the Circuit Court of said County,° ——— Rules, 1903.*[2]

A. B. of ——— County,
Plaintiff,
v.
C. D. of ——— County,
Defendant.
} In Chancery.

To the Honorable ———, Judge of the Circuit Court of said County:

No. 2.

WHEN COMPLAINANT IS A MARRIED WOMAN.[3]

*(As in No. 1 down to the *.)*

and its terms were prescribed by the court upon every change of the custody of the seal or alteration in the style of the person to whom it was committed. 1 Dan., Ch., 462; 1 Welf., Eq., 99; 1 Harr., Ch., 86.

It will be observed that the place of residence of each of the parties is designated in the form as given above. It is stated by Chancellor Walworth, in Howe v. Harvey, 8 Paige Ch. (N. Y.) 73, 4 L. Ed. 349, that "it appears to be laid down in all the books upon chancery pleading, that the residence or abode of the complainant should be stated in the bill; though by the practice in this state a particular description of his calling or business does not appear to be necessary. The object of setting forth the residence of the complainant is stated to be, that the court and the defendant in the suit may know where to resort to compel obedience to any order or process of the court, and particularly for the payment of any costs which may be awarded against such complainant; or to punish him for any improper conduct in the course of the suit. Mitf., 3d Am. Ed., 43, 74; 1 Mont., Pl. in Eq., 76n; 1 Dan., Ch. Pr., 463; Story, Eq. Pl., 21, § 26."

But however commendable such a rule may be, it is believed that in West Virginia it is more honored in the breach that in the observance.

In West Virginia, the residence and post-office address of the defendant in a divorce suit should be stated in the bill. W. Va. Code, 1916, c. 64, § 17; Acts 1915, c. 73.

[2] In *West Virginia*, the rules are held, as we have already seen (*ante*, § 272) every month; while in *Virginia*, they are held on the first and third Mondays thereof. So, in the former state, the rule day may be shown in the caption (after the °) thus: "March Rules, 1903," or whatever the rule day at which the bill is filed, or to which the process is returnable; and in the latter state, thus: "1st or 2nd March Rules, 1903," as the case may be. 2 Bart., Ch. Pr. (2nd Ed.), 1265.

[3] It is expressly provided now by statute in the *Virginias* that when-

A. B., a married woman, who sues by C. D., her next friend,
Plaintiff,
v.
E. F.,
Defendant.
In Chancery.

(Proceed as in No. 1.)

No. 3.

WHERE THE PLAINTIFF IS AN INFANT.

*(As in No. 1 down to the *.)*

A. B., an infant, within the age of twenty-one years, by C. D., his next friend,
Plaintiff,
v.
E. F.,
Defendant.
In Chancery.

(Proceed as in No. 1.)

No. 4.

WHERE COMPLAINANT IS INSANE AND FOR WHOM A COMMITTEE HAS BEEN APPOINTED.[4]

*(As in No. 1 down to the *.)*

ever a married woman may sue, either at law or in equity, she may do so as a *feme sole*. And, of course, no next friend is required. W. Va. Code, 1913, c. 66, § 15; Va. Code, 1904, § 2288a. Hence in *Virginia* and *West Virginia*, the form of the bill should be as in No. 1.

Mr. Barton says: "A married woman formerly sued also by her next friend, but unlike the case of infants and lunatics, no one could be named her next friend without her consent, but now, if adult, she sues in her own name and not by next friend." 1 Bart., Ch. Pr. (2d Ed.), 274.

The foregoing form is no longer in use in the *Virginias*, nor in any other state in which a married woman may sue as a *feme sole*.

[4] As already shown (*ante*, § 65), all suits by and on behalf, as well as against the lunatic, must be in

A. B., the committee of the estate of C. D., an insane person, so found by inquisition,
Plaintiff,
v.
E. F.,
Defendant.
In Chancery.

(Proceed as in No. 1.)

No. 5.

WHERE ONE CREDITOR SUES ON HIS OWN BEHALF AND THAT OF OTHER CREDITORS, TO ENFORCE A JUDGMENT LIEN.[5]

*(As in No. 1 down to the *.)*

A. B., on behalf of himself and all other lien creditors of C. D.,
Plaintiff,
v.
E. F.,
Defendant.
In Chancery.

(Proceed as in No. 1.)

No. 6.

WHERE A CREDITOR SUES ON BEHALF OF HIMSELF AND OTHER CREDITORS TO SET ASIDE A PREFERENCE CREATED BY THE VOLUNTARY ACT OF THE DEBTOR.[6]

*(As in No. 1 down to the *.)*

the name of his committee when he has one; otherwise it may be in his own name by his next friend, and also in his own name when his interests are antagonistic to those of his committee. See also, Cooper v. Hepburn, 15 Gratt. (Va.) 551; Bird v. Bird, 21 Gratt. (Va.) 712; Wheeler v. Thomas, 116 Va. 259, 81 S. E. 51; Lake v. Hope, 116 Va. 687, 82 S. E. 738; Houseman v. Home Insurance Co., 78 W. Va. 203, 88 S. E. 1048, L. R. A. 1917A, 299.

[5] As to who should be defendants to a bill to enforce judgment liens, see *ante*, § 61.

[6] The law as to preferences among creditors will be found in the note to Form 24.

A. B., who sues on behalf of himself and all other unsatisfied creditors of C. D. who shall come in and contribute to the costs and expenses of this suit,
Plaintiff,
v.
E. F., G. H. [*naming all other defendants*],
Defendants.
} In Chancery.

(Proceed as in No. 1.)

No. 7.

WHERE A CORPORATION IS PLAINTIFF.

*(As in No. 1 down to the *.)*

The ——— Company, a corporation created by and existing under the laws of ———,[7]
Plaintiff,
v.
E. F.,
Defendant.
} In Chancery.

(Proceed as in No. 1.)

No. 8.

WHERE COMPLAINANT SUES AS ADMINISTRATOR.

*(As in No. 1 down to the *.)*

[7] Here insert the name of the state under the laws of which such corporation was chartered.

A. B., administrator of the estate of C. D., deceased,
Plaintiff,
v.
E. F.,
Defendant.
} In Chancery.

(Proceed as in No. 1.)

No. 9.

WHERE COMPLAINANT SUES AS ADMINISTRATOR WITH THE WILL ANNEXED.

*(As in No. 1 down to the *.)*

A. B., administrator with the will annexed of the estate of C. D., deceased,
Plaintiff,
v.
E. F.,
Defendant.
} In Chancery.

(Proceed as in No. 1.)

No. 10.

WHERE COMPLAINANT SUES AS EXECUTOR.[8]

*(As in No. 1 down to the *.)*

A. B., executor of the last will and testament of C. D., deceased,
Plaintiff,
v.
E. F.,
Defendant.
} In Chancery.

(Proceed as in No. 1.)

[8] See Hurt v. Addington, 84 N. Car. 143.

No. 11.

WHERE THE COMPLAINANT SUES AS SPECIAL RECEIVER.

*(As in No. 1 down to the *.)*

A. B., as receiver of the property of C. D.,
Plaintiff.
v.
E. F.,
Defendant.[9]
} In Chancery.

(Proceed as in No. 1.)

No. 12.

WHERE THE PLAINTIFF SUES AS SPECIAL COMMISSIONER.

*(As in No. 1 down to the *.)*

A. B., special commissioner in the case of C. D. v. E. F.,
Plaintiff,
v.
G. H.,
Defendant.[10]
} In Chancery.

(Proceed as in No. 1.)

No. 13.

WHERE THE PLAINTIFF SUES AS ADMINISTRATOR DE BONIS NON.

*(As in No. 1 down to the *.)*

[9] See Hegewisch v. Silver, 140 N. Y. 414, 35 N. E. 658, from which the above title is taken.

[10] See Blair v. Core, 20 W. Va. 265, from which the above form is taken.

A. B., administrator *de bonis non* of the estate of C. D., deceased,
Plaintiff,
v.
E. F.,
Defendant.[11]
} In Chancery.

(Proceed as in No. 1.)

No. 14.

WHERE THE PLAINTIFFS SUE AS PARTNERS.

*(As in No. 1 down to the *.)*

A., B. and C., partners,° under the firm name [*or* after the ° doing business under the firm name and style, *or* doing business under the name and style] of A and Company,
Plaintiffs,
v.
D. E.,
Defendant.
} In Chancery.

(Proceed as in No. 1.)

No. 15.

WHERE THE PLAINTIFF SUES AS A SURVIVING PARTNER.

*(As in No. 1 down to the *.)*

[11] The words *"de bonis non"* are not necessary where words of like import are used. Barkman v. Duncan, 10 Ark. 465.

A., surviving partner of himself and B., who did business under the firm name of A., B. and Company,
Plaintiff,
v.
C. D.,
Defendant.
} In Chancery.

(Proceed as in No. 1.)

No. 16.

WHERE THE PLAINTIFF SUES AS A MUNICIPAL CORPORATION.

*(As in No. 1 down to the *.)*

A., a municipal corporation,
Plaintiff,
v.
B. C.,
Defendant.
} In Chancery.

(Proceed as in No. 1.)

§ 907. The introduction of the bill,[12] showing also the different capacities in which a party may sue.

No. 17.

THE GENERAL FORM.

(Here insert the title as shown in forms 1-16, as the case may require.)

Humbly complaining, sheweth unto your honor, your orator, A. B., of ———, in the county of ——, and state of ———, that, etc.[13]

[12] As to what the introduction of the bill usually contains, see *ante*, § 104.

[13] This form is taken from Curtis, Equity Precedents, 31 p. 2.

The terms "orator" (feminine, "oratrix"), "complainant" and "plaintiff" are used interchangeably in the *Virginias;* likewise, the terms "defendant" and "respondent."

No. 17*a*.

A SECOND GENERAL FORM.

(Title of cause as in form No. 1.)

Your orator, A. B., complaining, sheweth unto the court, that, etc.[14]

No. 18.

A THIRD GENERAL FORM.

(Omit title of cause as in form No. 1.)[15]

To Honorable ———, Judge of the Circuit Court of ——— County, West Virginia:

The bill of complaint of A. B. [stating the names of all the plaintiffs] * against C. D. [stating the names of all the defendants, if known, and if not, designate them as the "unknown parties," or "unknown heirs" etc., as the case may be] filed in the Circuit Court of ——— County. The plaintiff complains and says that, etc.

No. 19.

WHERE THE COMPLAINANT IS AN INFANT.

(Title of cause as shown in form No. 1.)

Complaining, sheweth unto your honor, your orator, A. B., of ———, an infant under the age of twenty-one years, to-wit, of the age of six years, or thereabouts, and son of E. B., of the same place, by the said E. B., his father and next friend [or son of E. B., late of ——— aforesaid, deceased, by C. D., his next friend], that, etc.[16]

[14] This form is taken from 2 Bart., Ch. Pr. (2nd Ed.), 1270.

[15] The form here given is the one prescribed by the Code of *West Virginia*, c. 125, § 37, omitting the address to the judge. See Morgan v. Morgan, 42 W. Va. 542, 26 S. E. 294; Cook v. Dorsey, 38 W. Va. 196, 18 S. E. 468.

[16] See Lube, Eq. Pl., 324, and Curtis, Equity Precedents, p. 2, where this form is given.

No. 20.

WHERE PLAINTIFF IS AN INFANT, A SECOND FORM.

(Title of cause as shown in form No. 1.)

Your orator, A. B., an infant of tender years, who sues by C. D., his next friend, complaining, sheweth, that, etc.[17]

No. 20*a*.

WHERE PLAINTIFF IS AN INFANT, A THIRD FORM.

(Title of cause as shown in form No. 1.)

The bill of complaint of A. B., an infant under the age of twenty-one years, who sues by E. F., his next friend [*continue as in form No. 18 from the* *].

No. 21.

WHERE THE COMPLAINANT IS THE COMMITTEE OF AN INSANE PERSON.

(Title of cause as shown in form No. 1.)

Your orator, A. B., committee of C. D., an insane person, complaining, sheweth:

1st. That upon proceedings duly had before ———, the Commission of Lunacy,[18] within and for the county of ———, in

[17] Taken from 2 Bart., Ch. Pr. (2d Ed.), 1270.

An order appointing a next friend is ordinarily not necessary. A recital or allegation in the pleading that the plaintiff sues by his or her next friend is all that the practice requires. Miles v. Boyden, 3 Pick. (Mass.) 213; Judson v. Blanchard, 3 Conn. 579.

But it is otherwise in *Virginia* when a lunatic sues by his next friend.

"A bill by a lunatic, suing by his next friend, is bad on demurrer, if it fails to aver that the next friend appears as such by the appointment or leave of the court. The fact that the bill avers that the next friend is a child of the lunatic does not change the rule, as the court considers only the situation of the lunatic, and the next of kin are not considered as having any interest in his property." Lake v. Hope, 116 Va. 687, 82 S. E. 738.

Likewise, since a lunatic can sue by next friend only under special circumstances, such circumstances should be alleged in the bill. See cases cited, *ante*, note 4.

[18] W. Va. Code, 1916, c. 58, § 4; Acts 1915, c. 51; Va. Code, 1904, § 1669.

said state, the said C. D. was duly adjudged insane and committed to the asylum, as will more fully and at large appear from the record of said proceedings, a copy of which is herewith filed as an exhibit, marked "Exhibit No. 1" and made part hereof; that subsequently on the ——— day of ———, 19—, by virtue and in pursuance of proceedings duly had before the ——— Court of said county, your orator was duly appointed, gave bond, and qualified, as the committee of the said C. D., which will more fully appear from the record of said proceedings, and said bond, attested copies of which are herewith filed, marked, respectively, "Exhibit No. 2" and "Exhibit No. 3," and made part of this bill.

No. 22.

WHERE THE PLAINTIFF IS A PRIVATE CORPORATION.

(Title of cause as shown in form No. 1.)

Humbly complaining, sheweth unto your honor, your orator, The ——— Company:

1st. That it is a corporation duly incorporated under [or established by] the laws of the state of ———.[19]

[19] See Curtis, Equity Precedents; Lube, Eq. Pl., 325.

In suits by or against a corporation, it is said that it is sufficient to allege in general terms that it is a corporation duly organized. Cal. Steam Nav. Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511; Dodge v. Minnesota Plastic Slate Roof Co., 14 Minn. 49 (Gil. 39); Smith v. Weed Sewing Machine Co., 26 Ohio St. 562.

But, as we have seen (*ante*, § 537), in the *Virginias* by virtue of statute (Va. Code, 1904, § 3280; W. Va. Code, c. 125, § 41), it is sufficient if the pleading *indicate* the fact of incorporation. In Gillett v. The American Stove and Hollow Ware Co., 29 Gratt. (Va.) 565, Burks, J., who delivered the opinion of the court, speaking as to the sufficiency of the allegation of the fact that the plaintiff in the suit was a corporation, says: "No affidavit was filed by the defendant with the plea in this case, and it is contended by his counsel here that the case does not come within the operation of the statute, because, as alleged, it does not appear that the plaintiff 'sued as a corporation.'

"We think it does sufficiently appear that the plaintiff 'sued as a corporation.'

"The writ and declaration are in the name of 'The American Stove and Hollow Ware Company' as

No. 23.

WHERE THE PLAINTIFF SUES ON BEHALF OF HIMSELF AND ALL OTHER LIEN CREDITORS TO ENFORCE A JUDGMENT.

(Title of cause as shown in form No. 1.)

Humbly complaining, *sheweth unto your honor, your orator, A. B., that he brings this suit on behalf of himself and all other lien creditors of said C. D., (1) [*or where two or more creditors unite as plaintiffs, which they may do, the form will be from the* * show unto your honor, your orators A. B. and E. F., who sue on behalf of themselves and all other lien creditors of said C. D.].

plaintiff. The name imports a corporation or, at least, the description amounts to an allegation that the plaintiff is a corporate body.

"*Woolf* v. *The City Steamboat Company*, 62 Eng. C. L. 103, was a case in *assumpsit*. The declaration commenced thus: 'The plaintiff complains of The City Steamboat Company, who have been summoned,' etc. There was a special demurrer to the declaration, assigning for causes, that the names of the defendants were not stated; that it did not appear whether they were sued as a corporation or a company completely registered, or by virtue of what act of parliament they were entitled to be sued by the name of a company. *Maule, J.*, in rendering judgment, the rest of the court concurring, said: 'The mode of pleading is governed either by positive rules or by a known course of precedents. There is no positive rule that I am aware of, which requires such a mode of description as the defendant's counsel insists upon in this case; nor is the description which is given at all not of the usual form; *it impliedly amounts to an allegation that the defendants are a corporate body.*'

"In *Norris* v. *Stapps*, Hob. 210, the Lord Chief Justice said: 'I am of opinion that they [the plaintiffs] needed not to show *how* they were incorporated, for *the name argues a corporation*, as the like of cities; and the plea *nil debet* (or the like) requires proof of it.'

"The decision in *Henriques* v. *Dutch West India Company*, 2 Ld. Raymond, 1532, is to the same effect.

"In the case of *Rees* v. *Conococheague Bank*, 5 Rand. 326, the declaration was in the name of 'The President and Directors of the Conococheague Bank,' without further description. It was not alleged in terms that the bank was a corporation, or how or by what power it was incorporated. Judge Green, in his opinion, concurred in by the other judges, said: 'Whether the Bank of Conococheague is an incorporated bank or not, or whether they have a legal right to sue in the name of the president and directors only, are questions which

No. 24.

WHERE THE PLAINTIFF SUES TO SET ASIDE A PREFERENCE CREATED BY THE VOLUNTARY ACT OF THE DEBTOR.

(Title of cause as shown in form No. 1.)

Humbly complaining, sheweth unto your honor, your orator, A. B., who brings this suit on behalf of himself and all other unsatisfied creditors of C. D. who shall come in and contribute to the costs and expenses of this suit, that, etc.[20]

might have been put in issue by the defendant or raised upon the trial of the general issue. *No averments as to these subjects were necessary in the declaration.'"*

In an action against a railroad company, it is not necessary to aver in the declaration that it is a corporation, nor is it necessary to prove on the trial that the defendant is a corporation, unless with the plea there is filed an affidavit denying that it is. The court will *ex officio* take notice of the fact. Balt. & Ohio R. R. Co. v. Sherman, 30 Gratt. (Va.) 602; Douglass v. K. & M. Ry. Co., 44 W. Va. 267, 28 S. E. 705.

"A summons setting forth the full corporate name of a defendant corporation, without reciting that it is a corporation, is sufficient." Snyder v. Philadelphia Co., 54 W. Va. 149, 46 S. E. 366, 63 L. R. A. 896, 102 Am. St. Rep. 941. See Belle-Meade Lumber Co. v. Turnbull, 77 W. Va. 349, 87 S. E. 382.

It is the usual practice in the *Virginias* simply to state that the party is a "corporation."

[20] In *West Virginia*, preferences among creditors of an insolvent debtor are now forbidden by statute, W. Va. Code, 1913, c. 74, § 2, which provides as follows: "Every transfer or charge made by an insolvent debtor attempting to prefer any creditor of such insolvent debtor or to secure such a creditor or any surety or endorser for a debt to the exclusion or prejudice of any other creditor, shall be void as to such preference or security, but shall be taken to be for the benefit of all creditors of such debtor, and all the property so attempted to be transferred or charged shall be applied and paid *pro rata* upon all the debts owed by such debtor at the time such transfer or charge is made; *provided*, that any such transfer or charge by an insolvent debtor shall be valid as to such preference or priority unless a creditor of such insolvent debtor shall institute a suit in chancery within one year after such transfer or charge was made to set aside and avoid the same and cause the property so transferred or charged to be applied toward the payment *pro rata* of all the debts of such insolvent debtor existing at the time such transfer or charge is made; subject, however, to the provision hereinafter contained with reference to creditors uniting in such suit and contributing to the expenses thereof. But if such transfer or charge be admitted to record

No. 25.

WHERE THE PLAINTIFF SUES AS ADMINISTRATOR.

(Title as shown in form No. 1.)

Humbly complaining sheweth unto your honor, your orator, A. B., administrator of the estate of C. D., deceased:

1st. That on the 6th day of January, 1903, said C. D. died intestate, and that * your orator was, on the 24th day of April, by the ——— Court of ——— County, in said state, duly appointed administrator of his estate, gave bond and qualified, and ever since hath been, and now is, acting as such administrator.[21]

within eight months after it is made, then such suit to be availing must be brought within four months after such transfer or charge was admitted to record. Every such suit shall be deemed to be brought in behalf of the plaintiff and all other creditors of such insolvent debtor, but the creditor instituting such suit or proceeding, together with all creditors of such insolvent debtor, who shall come into the suit and unite with the plaintiff before final decree and agree to contribute to the costs and expenses of said suit, shall be entitled to have their claims first paid in full *pro rata* out of the property so transferred or charged, in preference to any creditor of such debtor who shall before final decree decline or fail to so unite and agree to contribute to the costs and expenses of said suit, but not in preference to such creditor as may attempt to sustain the preference given him by such transfer or charge."

In the absence of a statute to the contrary, an insolvent debtor may prefer one creditor to another (Hogg, Eq. Princ., § 200), and this he may do in *Virginia*, requiring releases from such as accept the benefits of the trust deed creating the preference. 1 Bart., Ch. Pr. (2d Ed.), 569. The author just cited, treating of the matter of preferences created by deed of trust made by the insolvent, says: "It has been held that such a deed must convey the whole of a debtor's property, although this fact need not appear on the face of the deed, and the retention of property of small value will not affect the deed, but this is not the rule where a release is not required; and while a sufficient description of the property conveyed is always requisite, yet where a deed referred to a schedule of goods which was then made out and intended to be annexed to the deed, although it was not so annexed at the time the deed was recorded, the description was held to be sufficient and the deed valid." *Idem*, 569.

For a full consideration of the policy and scope of the law against preferences in *West Virginia*, see Hogg, Eq. Princ., §§ 200-203; Foley v. Ruley, 50 W. Va. 158, 40 S. E. 382.

[21] A statement that the plaintiff sues in the capacity of administra-

No. 26.

WHERE PLAINTIFF SUES AS ADMINISTRATOR WITH THE WILL ANNEXED.

(Title as shown in form No. 1.)

Humbly complaining, sheweth unto your honor, your orator, A. B., administrator with the will annexed of the estate of C. D., deceased:

1st. *That on the 22nd day of January, 1903, the said C. D. died, leaving a last will and testament; that on the 1st day of February, 1903, said last will and testament was duly admitted to probate by the County Court of ——— County, in the state of ———, all which will more fully and at large appear by reference to said will and order probating the same, attested copies of which are herewith filed as exhibits marked, respectively, "Exhibits Nos. 1 and 2," and made part of this bill.*

tor is a sufficient allegation that he is administrator. Duncan v. Duncan, 19 Mo. 368.

It has been decided that a complaint will not be held bad because it contains no express allegation that the plaintiff sues in a representative capacity, if the complaint otherwise contains essential averments showing that the plaintiff has such representative capacity and fairly apprises the defendant that plaintiff's intent is to prosecute in such capacity. Cordier v. Thompson, 8 Daly (N. Y.) 172. See, however, *ante*, § 114.

The abbreviation "admr." following the plaintiff's name sufficiently stands for the word "administrator." Moseley v. Mastin, 37 Ala. 216.

With reference to the sufficiency of a pleading, to show that the plaintiff sues in a representative capacity, the court, in Lucas v. Pittman, 94 Ala. 616, 10 So. 603, decides: "The words 'as administrator' following the plaintiff's name in the caption of a complaint, are sufficient to show that the plaintiff sues in a representative capacity, though no allegation with reference thereto is made in the complaint. The word 'administrator,' following alone the plaintiff's name in the caption, is a mere word of personal description, but, if the body of the complaint following such a caption contains a sufficient statement to show that plaintiff sues in his representative capacity, the body of the complaint will govern the caption. Montgomery Co. v. Barber, 45 Ala. 237, overruled."

2nd. That on the 5th day of March, 1902, letters of administration, with said last will and testament annexed, were duly issued to the said plaintiff, appointing him, the said A. B., as the sole administrator with the will annexed of the estate of said C. D., deceased; and that thereupon the said A. B. duly qualified as such administrator and entered upon the discharge of his duties as such administrator and is now acting as such.

Whether words, such as "executor" or "administrator," following the name of a party are to be deemed descriptive of the person of the party or of the character in which he sues or is sued, is to be determined by the allegations of the pleading. Hanson v. Blake, 63 W. Va. 560, 60 S. E. 589.

It has been held that pleading to the merits admits the right of the plaintiff to sue in the capacity averred by the plaintiff. McDonald v. Cole, 46 W. Va. 186, 32 S. E. 1033. In this case the court holds: "Where one sues as executor or administrator, or in other representative character, there need be no proof of his appointment or authority, unless a plea denies it. A plea to the merits admits the right of the plaintiff to sue as he does."

But the authority of this case may be questioned under the rule announced in later West Virginia cases cited below.

See in this connection, McNulta v. Lockridge, 137 Ill. 279, 27 N. E. 452, 31 Am. St. Rep. 362.

Under recent decisions of the supreme court of appeals of West Virginia, failure to allege the appointment and qualification of a plaintiff administrator is held to be ground for a demurrer and reversible error. Austin v. Calloway, 73 W. Va. 231, 80 S. E. 361, Ann. Cas. 1916E, 112; Perry v. New River, etc., Coal Co., 74 W. Va. 122, 81 S. E. 844; Moss v. Campbell Creek R. Co., 75 W. Va. 62, 83 S. E. 721; Potts v. Union Traction Co., 75 W. Va. 212, 83 S. E. 918; Neil v. West Virginia Timber Co., 75 W. Va. 502, 84 S. E. 239; Byer v. Paint Creek Collieries Co., 76 W. Va. 641, 86 S. E. 476; Brogan v. Union Traction Co., 76 W. Va. 698, 86 S. E. 753. The same rule, of course, would apply to an executor.

These cases overrule earlier decisions by the same court, and no reason is apparent why the new rule will not be applied in equity when the occasion shall arise. Consequently, the appointment and qualification of such a representative should be positively alleged in the bill and not left to mere inference from terms of personal description. But possibly, while proper, it would not be expedient to exhibit the record of the appointment and qualification with the bill. In most instances, the averments of the bill in this respect likely will not be denied; and if they should be denied, the record may be offered in evidence, in lieu of filing it as documentary evidence with the bill. *Ante*, § 156.

No. 27.

WHERE PLAINTIFF SUES AS EXECUTOR.

(Title as shown in form No. 1.)

Humbly complaining, sheweth unto your honor, A. B., executor of the last will and testament of C. D., deceased:

1st. [*Here follow form No. 26 from * to **.]

2nd. That immediately after the probate of said will, to-wit, on the 1st day of February, 1903, letters testamentary were regularly and duly issued by said county court to said A. B., your orator, the sole executor named in said last will and testament, and that said A. B. thereupon duly qualified and entered upon the discharge of the duties of his said office as such executor and is now acting as such.[22]

No. 28.

WHERE THE PLAINTIFF SUES AS SPECIAL RECEIVER.

(Title as shown in form No. 1.)

Humbly complaining, your orator, A. B., receiver of the property of C. D., sheweth unto your honor:

1st. That on the ——— day of ———, 1903, by the circuit court [or in vacation by the judge of the circuit court, *as the*

[22] Forms Nos. 26 and 27 are taken substantially from 4 Enc. Forms, 1070, 1071, 1076.

An allegation that letters testamentary were granted and issued by the county court is sufficient without averring an acceptance of the trust and qualification therefor. Mattison v. Childs, 5 Colo. 78.

Where the plaintiffs in a petition style themselves executors of A., state that the note sued on was made to their testator, aver his death, and bring into the court and make profert of the letters of administration, it was held that though there were no direct averments of plaintiffs' appointment as executors, yet that fact was necessarily inferable from other facts stated. Bird v. Cotton, 57 Mo. 568. But see recent West Virginia cases cited in preceding note.

Allegation that probate and qualification were had in the probate court before filing the complaint is sufficient. Hurst v. Addington, 84 N. Car. 143.

case may be] of ——— county, in the state of ———, in the cause of E. F., plaintiff, against said C. D., defendant, pending therein, your orator was duly appointed receiver of the estate of said C. D., and by another order made in said cause by said court, on the ——— day of ———, 1903, your orator was duly authorized and empowered to sue and collect all claims and debts owing to the said C. D.[23]

No. 29.

WHERE PLAINTIFF SUES AS SPECIAL COMMISSIONER.

Humbly complaining, your orator, A. B., special commissioner in the case of C. D. v. E. F., sheweth unto your honor:

1st. That your orator was, on the ——— day of ———, 1903, by the circuit court of the county of ———, and state of ———, in the said case duly appointed special commissioner, to make sale of the property hereinafter described and that sale was made thereof to said G. H., who executed to your orator, as special commissioner, the bonds hereinafter described for the deferred payments of the purchase money; that your orator was, on the ——— day of ———, 1903, duly authorized and empowered by said court to sue upon and collect said bonds by a decretal order duly entered in said case as of the said last-named date.[24]

[23] A receiver has no power to sue unless authorized so to do by the court that appointed him. *Ante*, § 65; Screven v. Clark, 48 Ga. 41; Battle v. Davis, 66 N. C. 252; King v. Cutts, 24 Wis. 627.

[24] See note to Form No. 12. The court, in Blair v. Core, 20 W. Va. 265, holds: "A person, who appointed by a decree of court special commissioner to make sale of lands under such decree and take bonds for deferred payments on said lands, and who makes such sale and takes bonds payable to himself as such commissioner, when said sale is reported to court and confirmed, has no authority to collect said sale bonds unless the decree conferring the appointment or some subsequent decree or order of court gives him authority to do so."

No. 30.

WHERE THE PLAINTIFF SUES AS ADMINISTRATOR DE BONIS NON.

(Title as shown in form No. 1.)

Humbly complaining, your orator, A. B., administrator *de bonis non* of the estate of C. D., deceased, sheweth unto your honor:

[*Here proceed as in form No. 25 to the * and then continue as follows:*] E. F. was on the ——— day of ———, 1903, duly appointed administrator of his estate, gave bond and qualified and continued to act as such administrator until his death [*or removal, as the case may be*], which occurred on the ——— day of ———, 1903, leaving a large part of the assets of said estate of C. D. not administered upon; that subsequently, to-wit, on the ——— day of ———, 1903, letters of administration of the goods, chattels, credits and other property of said estate so not administered upon by said E. F., as administrator aforesaid, were duly issued to your orator as sole administrator *de bonis non* of said estate; and thereupon your orator, A. B., duly qualified as such administrator *de bonis non*, and immediately entered upon the discharge of his duties as such administrator, and ever since that time has been and now is acting as such administrator.

No. 31.

WHERE THE PLAINTIFFS SUE AS PARTNERS.

(Title as shown in form No. 1.)

Humbly complaining, your orators, A., B. and C., partners under the firm name of A. & Company, show unto your honor:

1st. That the said A., B. and C., your orators, are a duly organized copartnership, carrying on business as wholesale grocers [*or whatever the business may be*], in the city of ———, in the county of ———, and state of ———, under the firm name of A. & Company.[25]

[25] As to the propriety of all partners uniting as plaintiffs in the bill, see *ante*, § 78.

No. 32.

WHERE THE PLAINTIFF SUES AS A SURVIVING PARTNER.

(Title as shown in form No. 1.)

Humbly complaining, your orator, A., surviving partner of himself and B., who did business under the firm name of A., B. & Company, sheweth unto your honor:

1st. That at the time hereinafter mentioned, your orator and said B. were partners, carrying on the business of ——— in the city [*or town*] of ———, in the state of ———, under the firm name and style of A., B. & Company.

2nd. [*Here set forth the cause of complaint, designating it by consecutively numbered paragraphs, at the option of the plaintiff's draftsman. See as to this § 423, note 25.*)

3rd. That on the ——— day of ———, 19—, said B. departed this life, leaving your orator the sole surviving partner of said firm.[26]

No. 33.

WHERE THE PLAINTIFF SUES AS A MUNICIPAL CORPORATION.

(Title as shown in form No. 1.)

Humbly complaining, your orator, A., a municipal corporation, sheweth unto your honor:

1st. That your orator is a corporation created by the laws of the state of West Virginia, under the corporate name of A.[27]

[26] A complaint by surviving partners should set out all the names of the partners and show how the parties became survivors. Hubbell v. Skiles, 16 Ind. 138.

An averment "that plaintiff and one *R. H. Crocker*, now deceased, were copartners in business preceding and at the time of said Crocker's death, which occurred on or about *October 17, 18*—, and as such copartners did business under the style of *Crocker & Reese*, and were the owners in copartnership of the personal property hereinafter described; that plaintiff is the sole surviving partner of said copartnership, and now is the owner and entitled to the immediate possession" of the property particularly described in the complaint, etc., is sufficient. Reese v. Kinkead, 17 Nev. 447, 30 Pac. 1087.

[27] Where the plaintiff is designated in the complaint as "The Board of School Trustees for the town of

No. 34.

§ 908. The premises or stating part of the bill.

(After setting out the facts showing plaintiff's equity.)

And your orator [or the plaintiff] hoped that said C. D., [the defendant] would have complied with the reasonable requests of your orator [or the plaintiff] as in justice and equity he ought to have done.[28]

No. 35.

§ 909. The confederating part of the bill.

But now so it is, may it please your honor, that the said C. D., combining and confederating with divers persons [*or if there are several defendants,* combining and confederating together and with divers persons] at present unknown to your orator [*or the plaintiff*] whose names, when discovered, your

Edinburg," such designation implies that such plaintiff is a corporation, and such complaint is sufficient on demurrer thereto for want of legal capacity to sue. Mackenzie v. Board of School Trustees, 72 Ind. 189.

In an action by a school district, it is not necessary to set out at length the manner in which the district was formed. Fort Dodge City School Dist. v. Wahkansa Dist. Tp., 15 Iowa 434.

[28] Lube, Equity Pl., 326; Curtis, Eq. Precedents, 4; Dunlap, Book of Forms, 421.

As we have already seen, this is the all-important part of the bill. *Ante,* §§ 105, 114, 115.

In addition to what has already been stated in c. 4, §§ 105, 114-156, it may be well to observe that a plaintiff will not be permitted or required to offer evidence of any material fact not distinctly alleged in the premises. Story, Eq. Pl., §§ 28, 257, 263. Nor can there be a valid decree without pleadings to support it. *Ante,* § 603.

"Where the facts stated in the bill are disproved, or are defectively stated, relief may be granted upon the facts stated in the answer. 3 A. K. Marsh, 474; 8 Dana 184; 10 Yerger 115; 7 Yerger, 30. But see, 11 Pet. 229; 7 Wheat. 522; 6 Johns. 564; Story, Eq. Pl., §§ 257, 264; 15 Vermont, 110; 8 Gill and Johns. 171." Ohio Forms and Practice, note, p. 588.

And every bill, too, must show clearly that the complainant has a right to the thing demanded, or such an interest in the subject matter as gives him a right to institute a suit concerning it. Story, Eq. Pl. § 23. See Jackson v. Jackson, 84 W. Va. 100, 99 S. E. 259.

orator [*or the plaintiff*] prays he may be at liberty to insert herein with apt words to charge them as parties defendant hereto, and contriving how to wrong and injure your orator [*or the plaintiff*] in the premises, he, the said R. H., absolutely refuses to comply with such requests, and he at times pretends that, etc. [*Here follows the charging part of the bill.*]

Or

But now so it is, may it please your honor, that the said R. H., L. M. and N. M., in concert with each other, allege that, etc. [or colluding and confederating with each other, refuse to comply with such requests, and pretend that, etc.].[29]

No. 36.

§ 910. The charging part of the bill.

That the said defendant sometimes alleges and pretends [*insert the supposed contention of defendant*], and at other times he alleges and pretends, etc., whereas your orator [*or the plaintiff*] charges the contrary to be the truth, and that, etc. [*stating the special matter with which plaintiff meets defendant's supposed case*].[30]

No. 37.

§ 911. The jurisdiction clause of the bill.

All which actings, doings, and pretenses of the said defendant [*or defendants*] are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your

[29] See Lube, Eq. Pl., 326; Dunlap, Book of Forms, 422.

As to what is said relative to this part of the bill, see *ante*, § 106.

[30] Lube, Eq. Pl., 326, 327. Every bill must contain sufficient matter in itself to maintain the case of the plaintiff (Harrison v. Nixon, 9 Peters [U. S.] 483, 9 L. Ed. 201); but it need not allege or specially describe all the evidence which is to be put into the case, provided it contains allegations broad enough to cover the evidence relied on. Nesmith v. Calvert, 1 Wood. and M. (U. S.) 34.

As to the use of the charging part of the bill in the practice in the Virginias, *vide ante*, § 107.

orator [*or the plaintiff*] in the premises. In consideration whereof, and forasmuch as your orator [*or the plaintiff*] is remediless in the premises, at and by the strict rules of the common law, and can have relief only in a court of equity, where matters of this nature are properly cognizable and relievable. [*Here follows the interrogatory part.*][31]

No. 38.

§ 912. The interrogatory part of the bill.

To the end, therefore, that the said C. D., and the rest of the confederates when discovered, may, upon their several and respective corporal oaths, full, true, direct, and perfect answer make, to all and singular the matters hereinbefore stated and charged [*or,* to all and singular the premises, *or,* to all and singular the charges and matters aforesaid] as fully and particularly as if the same were hereinafter repeated, and they thereunto distinctly interrogated [*or,* as fully in every respect as if the same were here again repeated, and they thereunto particularly interrogated]; and that not only as to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay, and belief [*or,* according to the best of their respective knowledge, information and belief]; and more especially, that they may answer and set forth whether, etc. [*Here follow the interrogatories to be answered by the defendant.*][32]

No. 39.

§ 913. The prayer of the bill for relief.

[*After the interrogating part*] and that the said defendant may come to a fair and just account, etc. [*stating the particular relief asked*] and that your orator may have such further

[31] Luhe, Eq. Pl., 327; *ante*, § 108. This part of the bill is really unnecessary. *Ante*, § 108.

[32] *Idem*, 327, 328. See as to the present use of this part of the bill, *ante*, § 109.

and other relief in the premises, as the nature of his case shall require, and to your honor shall seem meet [*or,* that your orator may be further and otherwise relieved in the premises according to equity and good conscience.][33]

No. 40.

ANOTHER FORM OF PRAYER FOR RELIEF.

And that an account may be taken by and under the direction and decree of this honorable court, etc., etc. And that the defendant may be decreed to pay unto your orator [*or the plaintiff*], etc., etc. And that your orator [*or the plaintiff*] may have such further or other relief in the premises as the nature of the circumstances of this case may require, and to your honor shall seem meet.[34]

No. 41.

PRAYER FOR AN ANSWER, OATH WAIVED—INJUNCTION AGAINST PROCEEDINGS AT LAW—DECLARATION OF TRUST—CONVEYANCE.

To the end, therefore, that the plaintiffs may have that relief which they can obtain only in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by the plaintiffs, and that the said defendants, who are plaintiffs as aforesaid in the said action at law, may be perpetually enjoined from further prosecuting the same, and that it may be declared that the said lands are charged with a trust in favor of, and ought to be held for, the use and benefit of, etc., and that the said defendants, or so many and such of them as shall appear to have the legal title to said lands, may be decreed to convey such legal title, free of all encumbrances done or suffered by them, or any or either of them unto the plaintiffs, in their said capacity, to hold to them and their, etc., upon the

[33] Lube, Eq. Pl., 328, 329. [34] *Idem*, 329.

trusts aforesaid, and for such further or other relief as the nature of this case may require, and to your honor shall seem meet.[35]

No. 42.

PRAYER FOR AN INJUNCTION.

Wherefore your orator prays the court now to grant him a writ of injunction,[36] restraining and enjoining the said defendants [*insert the special matters sought to be enjoined*], until the further order and decree of this court in the premises.[37]

No. 43.

PRAYER FOR THE PRODUCTION OF DEEDS, PAPERS, ETC.

And that the said defendants may set forth a list or schedule, and description of every deed, book, account, letter, paper, or writing relating to the matters aforesaid, or either of them; or wherein or whereupon there is any note, memorandum, or writing relating in any manner thereto, which now are, or ever were, in their or either, and which, of their possession or power, and may deposit the same in the office of the clerk [*or*, in the hands of one of the masters] of this honorable court, for the usual purposes; and otherwise that the said defendants may account for such as are not in their possession or power.[38]

No. 44.

THE PRAYER FOR PROCESS.

May it please your honor to grant unto the plaintiff a writ of subpoena, to be directed to the said C. D. and F. E., thereby

[35] *Idem*, citing Earle v. Wood, 8 Cush. (Mass.) 430.

[36] Not usual to issue formal writ of injunction in the *Virginias*. See *post*, § 1259 and note.

[37] Lube, Eq. Pl., 330.

[38] *Idem*.

As to the prayer for relief, see *ante*, § 110, where the subject is considered.

commanding them, and each of them, at a certain time, and under a certain penalty therein to be limited, personally to appear before this honorable court [*or,* your honor in this honorable court], and then and there full, true, direct, and perfect answer make to all and singular the premises,* *and further to stand to, perform and abide such further order, direction, and decree therein as to this honorable court* [*or, to your honor*] *shall seem meet* [*or as shall seem agreeable to equity and good conscience.*][39]

[39] Lube, Eq. Pl., 330.

The words in italics commencing at the * must be omitted in bills merely for *discovery*, or to *perpetuate the testimony of witnesses.* Story, Eq. Pl., § 44, note; Barton, Suit in Eq., 43, note 1; Equity Draftsman, 6.

As to what is said as to the necessity of this part of the bill, see *ante*, § 111.

CHAPTER XXXVII

THE PRECIPE, PROCESS, AND FORMS RELATING THERETO.

§ 914. General observations as to forms.
§ 915. The ordinary form of a precipe.
Another form of an ordinary precipe.
Precipe where there are several defendants, some of whom are nonresidents and infants.
§ 916. The summons commencing a suit in Virginia.
The summons commencing a suit in West Virginia.
The affidavit of the nonresidence of the defendant.
The affidavit of nonresidence and as to the unknown defendants.
§ 917. The order of publication in West Virginia.
§ 918. Certificate as to the publication of the order to be appended thereto.
§ 919. The affidavit as to the posting of an order of publication in West Virginia to be appended thereto.
§ 920. Certificate of publication and posting in Virginia.
§ 921. Order of publication in Virginia as to a natural person.
Order publishing process as to corporations.
§ 922. Sheriff's return upon process or notice.
Where defendant is served in person.
Sheriff's return upon summons to be served on a natural person when service is made on a member of defendant's family.
Where service is made on defendant by posting a copy of the process at the front door of his usual place of abode.
When service is made upon a corporation upon its attorney.
Where service is made upon a corporation upon its president.
Where service is made upon a corporation when it can not be had upon its president or other chief officer.
Where service is made upon a corporation which has failed to comply with section 24, chapter 54, of the Code of West Virginia.
Where service is made in West Virginia upon a corporation by delivering a copy of the summons to a depot or station agent.
Where service is made in West Virginia upon a corporation by delivering a copy of the summons to a director.
Where service is made in West Virginia upon a foreign insurance company.

§ 922. Sheriff's return upon process or notice.—*Continued.*
Where service is made in West Virginia upon an unincorporated common carrier.
Where service is made upon a corporation in Virginia.
Where service is made upon a garnishee in an attachment suit in West Virginia.
Where an attachment has been levied.
§ 923. Private person's return upon process or notice.
Where the defendant is a resident of the state.
Where the defendant is a nonresident of the state.

§ 914. General observations as to forms.

As observed by an author of high repute,[1] "the great utility in consulting and adhering to the settled and well-understood forms and language of courts has been often noticed by eminent judges.[2] It is, therefore, necessary to understand all the different forms that constitute the administrative machinery which courts of equity have, from time to time, devised to meet the exigencies of cases as they arise, working out the equities on both sides, protecting defendants as well as relieving plaintiffs." Realizing the truth of this observation, we have entered upon the preparation of those forms usually needed in the practical administration of justice in a court of equity, beginning with the presentation of the title and commencement of a bill in equity, which may be filed by a plaintiff in various capacities, characters and relationships, followed by the formal parts of the original bill in chancery as recognized by the approved practice in the tribunals of equity.

We have thus entered upon the subject, because the title gives the names of the parties as they will appear in the precipe,

[1] Mitford, Eq. Pl. (Tyler's Ed.), 494.

"Law, it may be said, is one thing and the expression of law another. But we can hardly, even in thought, divorce the matter of law from its forms." 1 Pollock and Maitland, History of English Law, 134.

"The form of the writ and pleadings has always been taken as good evidence of what the law is." 1 Street, Foundations of Legal Liability, 216.

"It has often been said that the forms of the law are the best evidence of the law." English, P., in Adkins v. Fry, 38 W. Va. 549, 556, 18 S. E. 737.

[2] Here the learned author cites 8 Ves. 303; 3 Ves. 13; 19 Ves. 593; 5 D. M. G. 354; 1 M. and K. 246.

the filing of which by the plaintiff, his attorney, or agent, is the first step towards the institution of the suit[3] and which is the clerk's authority for the issuance of the process commencing the suit, and from which he takes the names of the parties to be inserted in such process; and further, because the other parts of the bill follow the title and commencement in logical and consecutive order.

No. 45.

§ 915. The ordinary form of a precipe.

A. ——— B. ———
v. } In Chancery.
C. ——— D. ———

The clerk of the Circuit Court of *Mason* County, *West Virginia,* will issue process in the above-named cause, returnable to *March* Rules, *1903.*

E——— F——— G———,
Solicitor.

No. 46.

ANOTHER FORM OF AN ORDINARY PRECIPE.

A. ——— B. ———
v. } In Chancery.
C. ——— D. ———

Issue summons in the above cause * returnable to ——— Rules, 190—, *or,* || returnable to 1st [*or 2nd, as the case may be*] ——— Rules, 190—.

E——— F——— G———,
Solicitor.[4]

[3] *Ante,* § 12.

[4] It will be observed that the above form is not addressed to the clerk. This form is to be used when the clerk is provided with a regular precipe book in which the precipes are entered, and then they are *impliedly* addressed to him. The form beginning with the || is used only in Virginia, and to be inserted after the *.

No. 47.

PRECIPE WHERE THERE ARE SEVERAL DEFENDANTS, SOME OF WHOM ARE NONRESIDENTS AND INFANTS.

John Doe
v.
Richard Roe and Fannie Roe, his wife. } In Chancery.

James Roe, and John Hunter, in his own right, adults and residents of this state; Minnie Roe and James A. Roe, infant children of Jacob Roe, deceased, and John Hunter, administrator of the estate of Jacob Roe, deceased, residents of this state; Wm. N. Powell and Amelia Powell, adults and nonresidents of this state; Henry Black and Fannie Jordan, infants and nonresidents of this state; the unknown children of Margaret Wilson, who was Margaret Roe, and now deceased; and C. B. Hancock, Sheriff of Frederick Co., Va., and committee administrator of Neil Wilson, deceased.

The clerk of the Circuit Court of *Mason* County, *West Virginia*, will appoint A. B. guardian *ad litem* for the infant defendants; issue process as to all the adult resident defendants, returnable to ——— Rules, 190—; and enter an order of publication against the nonresident adult defendants as per accompanying affidavit. Q——— G——— & C———,
Solicitors.[5]

No. 48.

§ 916. The summons commencing a suit in Virginia.

The Commonwealth of Virginia,

To the Sheriff of Frederick County, Greeting:

You are hereby commanded to summon Richard Roe, Fannie Roe, James P. Roe, John Hunter, administrator of Jacob Roe,

[5] See 2 Bart., Ch. Pr. (2d Ed.), 1265, 1266.

In *West Virginia*, it has been decided in a recent case that, "it is not necessary to issue a formal summons against a defendant who is shown by affidavit filed with the clerk to be a nonresident." Augir v. Warder, 74 W. Va. 103, 107, 81 S. E. 708. *But see*, Yates v. Payne, 4 H. & M. (Va.) 413; Duguid v. Patterson, *idem*, 445.

See as to service of process on persons under disability, *ante*, § 16.

and Minnie Roe and James Roe to appear at the clerk's office of the Circuit Court of Frederick County, at rules to be held on the first [*or third*] Monday in September next, to answer the bill of complaint of John Doe, and this you shall in no wise omit, and have then there this writ.

Witness R. L. G. ———, clerk of said court, at the courthouse thereof, this 15th day of August, 1890, and in the ——— year of the commonwealth.[6]

——— ———,
Clerk.

No. 49.

THE SUMMONS COMMENCING A SUIT IN WEST VIRGINIA.

The State of West Virginia,

To the Sheriff of *Mason* County, Greeting:

We command you that you summons C. D., if he be found in your bailiwick, to appear before the judge of the Circuit Court for the County of Mason, at rules to be held in the clerk's office of said court on the first Monday in *August* next, to answer the bill of complaint of A. B., exhibited therein against him, and this you shall in no wise omit, and have then and there this writ.

Witness R. E. M., clerk of our said circuit court at the courthouse thereof this the 12th day of July, 1903, and in the 41st year of the state.[7]

No. 50.

THE AFFIDAVIT OF THE NONRESIDENCE OF THE DEFENDANT.

State of ———,

County of ———, to-wit:

Before the undersigned authority this day personally came A. B., who after being duly sworn says that he is the plaintiff

[6] See 2 Bart., Ch. Pr. (2d Ed.), 1266, from which this form is taken.

[7] See W. Va. Code, 1913, c. 124, §§ 1, 5.

in the chancery cause of A. B. against C. D., defendant, pending in the circuit court of ——— county, state of ———, and that said C. D. is a nonresident of the said state of ———.

———.

Taken, sworn to and subscribed before me this the ——— day of ———, 190—. ———.

My commission expires ——— [*stating the date, if a notary public*].

No. 51.

THE AFFIDAVIT OF NONRESIDENCE AND AS TO THE UNKNOWN DEFENDANTS.

State of ———,

County of ———, to-wit:

[*Here give the style of the cause and the name of the court in which it is pending.*]

Q——— personally appeared before me in my county and in the clerk's office aforesaid, and made oath that Wm. N. Powell and Amelia Powell, adults, and Henry Black and Fannie Jordan, infants, are not residents of the state of Virginia [or that diligence has been used and process issued in vain as prescribed by Va. Code, § 3230, Code W. Va., c. 124, § 11], and that the children of Margaret Wilson, who was Margaret Roe, but now deceased, are or may be interested in the subject to be disposed of in this suit, if any such children there be, and that their names are unknown.

Given under my hand this 15th day of August, 1890.

R. L. G.,

Clerk of the Circuit Court of Frederick Co., Va.[8]

No. 52.

§ 917. The order of publication in West Virginia.

State of West Virginia.

At rules held in the clerk's office of the circuit court of ——— county on Monday, the ——— day of ———, 1903, the following order was entered:

[8] 2 Bart., Ch. Pr. (2d Ed.), 1266.

A. B.
v. } In Chancery.
C. D., E. F. [*name all the defendants*].

The object of the above-entitled suit is [*here state the object of the suit*].[9] And it appearing by affidavit filed in this cause that the said defendant E. F. is a nonresident of this state, it is ordered that he do appear here within one month after the date of the first publication hereof and do what is necessary to protect his interests.[10]

A Copy, Teste:

R. E. M., Clerk.[11]

J. M. G., Solicitor.

No. 53.

§ 918. Certificate as to the publication of the order to be appended thereto.

I, ———, the editor of the [*here insert the name of the newspaper*], a newspaper published in the county of ——— [*the county in which the order is entered*], and state of ———, do certify that the foregoing order of publication was published in said newspaper once a week for four successive weeks, beginning on the ——— day of ———, 190—.

Given under my hand this the ——— day of ———, 190—.

———,
Editor of ———.[12]

[9] See *ante*, §§ 20, 21.

[10] See W. Va. Code, c. 124, § 12.

[11] See *ante*, § 25.

An order of publication may be entered in court or at rules. W. Va. Code, 1913, c. 124, § 11; Va. Code, 1904, § 3230.

It must appear from the record that the order of publication was properly executed. Hoffman v. Shields, 4 W. Va. 490.

In Steenroad v. Railroad Co., 27 W. Va. 1, it was contended that the object of the suit was not sufficiently stated, but the court held otherwise. See this case.

[12] It is provided by statute that where anything is required by any statute to be published in a newspaper, the certificate of the editor or publisher, or affidavit of any other person, shall be admitted as evidence of what is stated therein as to the publication. W. Va. Code, 1913, c. 130, § 32. The same statute exists in Virginia. Va. Code, 1904, § 3358.

No. 54.

§ 919. The affidavit as to the posting of an order of publication in West Virginia to be appended thereto.

State of West Virginia,
County of ———, to-wit:

Before the undersigned authority this day personally came J. G. M., who, after being duly sworn, says that he posted the foregoing order of publication at the front door of the courthouse of the county of ——— [*the county wherein the court is held*], in the state of West Virginia, for twenty days prior to the first day of the ——— term, 19—, of said court.

———.

Taken, sworn to and subscribed before me this the ——— day of ———, 19—.[13]

No. 55.

§ 920. Certificate of publication and posting in Virginia.

I, ———, editor of ———, a paper published in the county of ———, do hereby certify that the above notice was published in the said paper once a week for four successive weeks, commencing on the ——— day of ———. ———,
Editor.

[*Or this may be proved by affidavit.*]

To which shall be added:

I, ———, clerk of the ——— court of ———, do hereby certify that the above notice was duly posted at the front door of the courthouse of the ——— court of ———, on the ——— day of ———, which was the first day of the ——— term of said court. ———,
Clerk of ——— Court.[14]

[13] As a decree may be entered on the first day of the term, it is advisable that the order be posted for twenty days prior thereto.

See *ante*, § 20, citing McCoy v. McCoy, 33 W. Va. 60, 10 S. E. 19.

[14] The foregoing form is taken from 2 Bart., Ch. (2d Ed.), 1268, 1269.

No. 56.

§ 921. Order of publication in Virginia as to a natural person.

Virginia: In the clerk's office of the circuit court of the city of Lynchburg, in vacation of said court, on Friday, the 23rd day of October, 1896.

Central Loan and Trust Co., ——— Plaintiff,
v.
Henry Martin, ——— Defendant. } In Chancery.

The object of this suit is to subject a house and lot, situate in the city of Lynchburg, on the northeast corner of Harrison and Floyd streets, and belonging to the defendant, Henry Martin, to the lien of a judgment recovered by the plaintiff against the defendant, in the circuit court of the county of Bedford, for $2,000, with interest thereon from April 1, 1896, and the costs of said suit.

And it appearing by proper affidavit filed that the said defendant, Henry Martin, is not a resident of the state of Virginia, it is ordered that he do appear here within fifteen days after due publication of this order in the *Lynchburg News,* and do what is necessary to protect his interest in this suit; and that this order be published and posted according to law.

Teste:

Samuel G. Wingfield,
Clerk.

Jones & Smith,
Solicitors.[15]

No. 57.

ORDER PUBLISHING PROCESS AS TO CORPORATIONS.

The Commonwealth of Virginia,

To the Sergeant of the City of Lynchburg, Greeting:

We command you that you summon the Central Loan & Trust Company of Philadelphia, a corporation incorporated

[15] The above form will be found in 2 Va. Law Reg. 548.

under the laws of the state of Pennsylvania, to appear before the judge of our circuit court for the city of Lynchburg, at the clerk's office of said court, at rules to be holden therefor, on the third Monday in December next, to answer a bill in chancery exhibited against the said Central Loan & Trust Company of Philadelphia, in our said court, by Henry Martin, and have then there this writ.

Witness Samuel G. Wingfield, the clerk of our said court, at the courthouse thereof, this 23rd day of October, A. D. 1896, and the 120th year of the commonwealth.

Teste:

Samuel G. Wingfield,
Clerk.

A copy.
Teste:
Samuel G. Wingfield,
Clerk.[16]

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§ 922. Sheriff's return upon process or notice.

No. 58.

WHERE THE DEFENDANT IS SERVED IN PERSON.

Executed the within summons upon the within-named ——— by delivering a copy thereof to him on the ——— day of ———, 19—.

J——— C——— L———,
Sheriff of ——— County, West Va.

[16] See 2 Va. Law Reg. 548, from which the above form is taken, and in which the difference in the publication as to a corporation and a natural person is thus shown:

Against Corporations—

1. The process in the suit is alone published.

2. This process is in the ordinary form of a summons to commence a suit.

3. The defendant is summoned to a certain rule day.

4. The publication is to be made for four weeks in such newspaper, printed in this state, as the clerk or court may prescribe.

5. No posting is required—publication in the newspaper "is sufficient."

Against Individuals—

1. The order of publication is alone published.

2. This order must give the abbreviated style of the suit and state briefly its object.

No. 59.

SHERIFF'S RETURN UPON SUMMONS TO BE SERVED ON A NATURAL PERSON WHEN SERVICE IS MADE ON A MEMBER OF DEFENDANT'S FAMILY.

Executed the within summons on the within-named ——— on the ——— day of ———, 19—, by delivering on that day a copy thereof to ———, his wife, at his usual place of abode [*or to any other person found there who is a member of his family and above the age of sixteen years*], giving the said ——— information of the purport of said copy, he, the said ———, not being found.

A——— B——— W———,
Sheriff of ——— County, West Va.[17]

3. The defendant is ordered to appear within fifteen days after due publication of the order.

4. The publication is to be made in such newspaper as the court or clerk may prescribe, whether printed or published in this state or not.

5. The order must also be posted at the front door of the courthouse.

[17] The above forms Nos. 58 and 59 are taken from Hogg, Pl. and Forms (2d Ed.), 632.

This form apparently has the approval of the *Virginia* and *West Virginia* courts. But the federal court, construing the *Virginia* statute, has held that the return must show that the wife *is a member of the defendant's family.* King v. Davis, 137 Fed. 198. To conform to this ruling, the phrase "she being a member of his family" should be inserted after the word "wife."

As to what constitutes "usual place of abode," see Maslin v. Hiett, 37 W. Va. 15, 16 S. E. 437, 439.

As to the requisites of a return when service is made on a member of defendant's family, see Midkiff v. Lusher, 27 W. Va. at p. 441.

In Fowler v. Mosher, 85 Va. 421, 7 S. E. 542, the court, in the course of its opinion, says: "In this case, the notice was served by the deputy sheriff, and the return is as follows: 'Executed August 2, 1888, by leaving with Mrs. Pierce a true copy of the within notice, she being over the age of sixteen years old, and explaining the purport of the same; she being a member of the said F. H. Fowler's family, and he not being at home.' Now, in *Smithson* v. *Briggs*, 33 Gratt. 180, this court held that the word 'residence,' that being the word used in the return, was synonymous with the words, 'his usual place of abode'; and so here, we think, we may hold as to the word 'home' used in this return. But was Mrs. Pierce a member of the plaintiff's family within the meaning of the statute? We think not. In the affidavit of the appellant, which is not controverted, it is shown that she was a stranger

No. 60.

WHERE SERVICE IS MADE ON DEFENDANT BY POSTING A COPY OF THE PROCESS AT THE FRONT DOOR OF HIS USUAL PLACE OF ABODE.

Executed the within summons on the within-named ——— by leaving a copy thereof posted at the front door of his usual place of abode, on the ——— day of ———, 19—, the wife of said ———, or any other person, being a member of his family and above the age of sixteen years, not being found there, and he, the said ———, not being found.

C——— S———,
Sheriff of ——— County.[18]

No. 61.

WHEN SERVICE IS MADE UPON A CORPORATION UPON ITS ATTORNEY.

Executed the within summons [*or served the within notice*] upon the within-named ———, a corporation, on the ——— day of ———, 19—, by delivering on that day a copy thereof

to his blood, and a mere boarder in his house. Obviously, it was not the intention of the statute that service upon such a person should be regarded as a legal service of a notice. Its purpose was to require service upon some person who would feel interested by the ties of consanguinity, and the relation of dependence, to communicate the fact of the service to the party for whom it was designed. Such motives can not be predicated of a mere boarder, who may or may not be inimical to the party for whom the notice is intended, and who may be there today and away tomorrow. Lexicographers, indeed, give to the word 'family' the enlarged meaning it has in general use—that is, of a collective body of persons who live together in a house, or under one head; but this is not the legal meaning of the word. In 1 Bouv. Law Dict. 512, it is said: 'Family—Domestic relatives. In a limited sense it signifies the father, mother and children. In a more extensive sense it comprehends all the individuals who live under the authority of another, and includes the servants of another.' It was in this legal and restricted sense (whether that includes servants we do not decide) that the word was, in our opinion, used in the statute; and we therefore hold that the service was not sufficient."

[18] W. Va. Code, 1913, c. 121, § 1; Va. Code, 1904, § 3207; and also Lewis v. Botkin, 4 W. Va. 533.

to ———, the person appointed by said corporation pursuant to law to accept service of process for it, in the county of ———, in the state of West Virginia, that being the county and state wherein the said ——— resides.

J——— C——— L———,
Sheriff of ——— County, West Va.[19]

No. 62.

WHERE SERVICE IS MADE UPON A CORPORATION UPON ITS PRESIDENT.

Executed the within summons [*or served the within notice*] upon the within-named ———, a corporation, on the ——— day of ———, 19—, by delivering on that day a copy thereof to ———, the president of said corporation, in the county of ———, in the state of West Virginia, that being the county and state wherein the said ———, president as aforesaid, resides.

J——— C——— L———,
Sheriff of ——— County, West Va.[20]

No. 63.

WHERE SERVICE IS MADE UPON A CORPORATION WHEN IT CAN NOT BE HAD UPON ITS PRESIDENT OR OTHER CHIEF OFFICER.

Executed the within summons [*or served the within notice*] upon the within-named ———, a corporation, on the ——— day of ———, 19—, by delivering on that day a copy thereof to ———, the treasurer [*or, the secretary or cashier, as the case may be*] of said corporation, in the county of ———, in the state of West Virginia, that being the county and state wherein

[19] W. Va. Code, 1916, c. 54, §§ 24, 24a(1),(3),(4),37; Va. Code, 1904, §§ 1266, 1267, 1286a(3), 1286a(2), (3), 3225-3227. See Stout v. Baltimore & Ohio R. Co., 64 W. Va. 502, 63 S. E. 317, 131 Am. St. Rep. 940.

[20] This form is taken from Hogg, Pl. and Forms (2d Ed.), 633, is founded on the statute of West Virginia (W. Va. Code, 1913, c. 124, § 7), and it may readily be adapted to the statute of Virginia. Va. Code, 1904, § 3225.

the said ———, treasurer as aforesaid, resides, the president or other chief officer of said corporation, and the person appointed pursuant to law to accept service of process for it, then being absent from said county of ———.

J——— C——— L———,
Sheriff of ——— County, West Va.[21]

No. 64.

WHERE SERVICE IS MADE UPON A CORPORATION WHICH HAS FAILED TO COMPLY WITH CHAPTER 54 OF THE CODE OF WEST VIRGINIA, SECTION 24.

Executed the within summons upon the within-named ———, a corporation, on the ——— day of ———, 19—, by delivering a copy thereof on that day to ———, in the county of ———, and state of West Virginia, the said ———, being the person then at and in charge of the principal office of the said corporation, there being no person appointed pursuant to law by said corporation to accept service of process for it under section 24 of chapter 54 of the Code of West Virginia.

J——— P——— P———,
Sheriff of ——— County, West Va.[22]

No. 65.

WHERE SERVICE IS MADE IN WEST VIRGINIA UPON A CORPORATION BY DELIVERING A COPY OF THE SUMMONS TO A DEPOT OR STATION AGENT.

Executed the within summons upon the within-named ———, a corporation, on the ——— day of ———, 19—, by delivering on that day a copy thereof to ———, a depot agent in the actual employment of the said corporation, in the county of ———, in the state of West Virginia, that being the county

[21] See Hogg, Pl. and Forms (2d Ed.), 633.

[22] For this statute and the corporations which may be formed under it, see Hogg, Pl. and Forms (2d Ed.), pp. 634, 635.

and state wherein the said ———, the depot agent in the actual employment of the said corporation, resides, the president or other chief officer of said corporation, and the person appointed pursuant to law to accept service of process for it, and the secretary, treasurer and cashier of said corporation, and the members of the board of directors thereof, all being absent from my county, and there being no other person within the state than the said ——— [*the said depot agent*] upon whom there can be service of the said summons.

J——— C——— L———,
Sheriff of ——— County, West Va.[23]

No. 66.

WHERE SERVICE IS MADE IN WEST VIRGINIA UPON A CORPORATION BY DELIVERING A COPY OF THE SUMMONS TO A DIRECTOR.

Executed the within summons upon the within-named ———, a corporation, on the ——— day of ———, 19—, by delivering on that day a copy thereof to ———, a member of the board of directors [*or, board of trustees, or visitors, as the case may be*] of said corporation, in the county of ———, in the state of West Virginia, that being the county and state wherein the said ———, a member of the board of directors aforesaid, resides, the president or other chief officer of said corporation, and the person appointed pursuant to law to accept service of process for it, and the secretary, the treasurer and cashier, all and each of them being then absent from the said county of ———.

J——— C——— L———,
S. M. C.[24]

No. 67.

WHERE SERVICE IS MADE IN WEST VIRGINIA UPON A FOREIGN INSURANCE COMPANY.

I served the within writ within the county of W———, West Virginia, as to the within-named H——— Insurance

[23] See *idem*, 634, and Spragins v. C. P. & R. Co., 35 W. Va. 139, 13 S. E. 45; Stout v. Baltimore & Ohio R. Co., 64 W. Va. 502, 63 S. E. 317, 131 Am. St. Rep. 940.

[24] See Hogg, Pl. and Forms (2d Ed.), 636.

Company, a corporation, of C———, Ohio, by delivering a copy thereof to W——— T——— P———, its lawful attorney appointed pursuant to statute to act on its behalf in acceptance and service of legal process, he being a resident of the said county of W———, this ——— day of ———, 19—.

C——— S———, D. S.,
For T——— D——— B———, S. O.[25]

No. 68.

WHERE SERVICE IS MADE IN WEST VIRGINIA UPON AN UNINCORPORATED COMMON CARRIER.

Executed the within summons upon the within-named A——— B——— and C——— D———, partners as common carriers under the firm name of ——— [*or, if not partners, say common carriers*], operating as such the steamboat [*or whatever the means of common carriage may be*] ——— [*here insert the name of the boat*], by delivering a copy thereof to ———, the captain of said steamboat, on the ——— day of ———, 19—.

J——— C——— P———,
Sheriff of ——— County, West Va.[26]

No. 69.

WHERE SERVICE IS MADE UPON A CORPORATION IN VIRGINIA.

The within summons was duly executed upon the within-named defendant, ——— [*a corporation, and giving its name*], by leaving a copy thereof with ———, the president [*or other*

[25] *Idem*, 637; Webster Wagon Co. v. Home Insurance Co., 27 W. Va. 314; Adkins v. Globe Insurance Co., 45 W. Va. 384, 32 S. E. 194.

[26] Hogg, Pl. and Forms (2d Ed.), 636.

See W. Va. Code, 1913, c. 124, § 9, and *ante*, § 11. In addition to this service of the summons, the statute provides that a copy of the summons must also be published under the 12th section of chapter 124 of the Code. *Idem.*

officer of corporation as the case may be], in the county of ———, where he resides, on the ——— day of ———, 19—.

C. B. H., Sheriff of Frederick Co., Va.[27]

No. 70.

WHERE SERVICE IS MADE UPON A GARNISHEE IN AN ATTACHMENT SUIT IN WEST VIRGINIA.

Executed the within order of attachment and indorsement thereon made upon W——— Y———, the person designated as having in his possession the effects of the within-named C——— D———, by delivering to him, the said W——— Y———, a copy of said attachment and indorsement, on the ——— day of ———, 19--, at ——— o'clock — M. of that day.

J——— C——— P———,
Sheriff of M——— County, West Va.[28]

No. 71.

WHERE AN ATTACHMENT HAS BEEN LEVIED.

Received the within order of attachment on the ——— day of ———, 19—, at ——— o'clock — M.

C——— P——— P———, S. M. C.

Executed the within order of attachment on the ——— day of ———, 19—, at ——— o'clock — M., by levying the same upon the personal property of the within-named ———, as set forth and described in the accompanying list hereto annexed and hereby returned with the said order of attachment. And I also took the said property into my possession at the time of making the levy aforesaid.[29]

[27] Taken from 2 Bart., Ch. Pr. (2d Ed.), 1267.

[28] Hogg, Pl. and Forms (2d Ed.), 638. This is sufficient in Virginia. 2 Bart., Law Pr., 961.

[29] Taken from Hogg, Pl. and Forms (2d Ed.), 635.

If the levy be made upon real estate, the form can easily be adapted to the requirements of the law in such case by reference to another part of this work, *ante*, § 806.

No. 71*a*.

§ 923. Private person's return upon process or notice.

WHERE THE DEFENDANT IS A RESIDENT OF THE STATE.

State of ———,
County of ———, to-wit:

Before me, A——— B———, a notary public [*or other officer competent to administer an oath*] in and for said county, this day personally came C——— D———, who, after being by me duly sworn, on his oath says that he executed the within summons [*or served the within notice*] on the within-named E——— F——— in ——— county, West Virginia, on the ——— day of ———, 19—, by then and there [*stating the appropriate mode of service, as illustrated in the forms under § 923, ante*]. C——— D———.

Taken, sworn to and subscribed before me in my said county this ——— day of ———, 19—.

A——— B———,
Notary Public [*or other officer*].

[*If a notary public, state when commission will expire.*][30]

No. 71*b*.

WHERE THE DEFENDANT IS A NONRESIDENT OF THE STATE.

State of ———,
County of ———, to-wit:

Before me, A——— B———, a notary public [*or other officer competent to administer an oath*] in and for said county,

[30] Process may be executed, or a notice served, by any credible person. W. Va. Code, 1913, c. 124, § 2. But the return of a private person requires, in addition to all the requisites of an officer's return, that the *place of service* be stated in the return. Lynch v. West, 63 W. Va. 571, 60 S. E. 606. The statute expressly requires such a return to be made under oath. Of course, an officer, acting as a private person, could execute process beyond his jurisdiction; but in such event his return would have the same status as that of a private person, and would have to be under oath.

this day personally came C——— D———, who, after being by me duly sworn, on his oath says that he executed the within summons [*or served the within notice*] on the within-named E——— F———, in the county of ——— and state of ———, on the ——— day of ———, 19—, by then and there delivering to him a copy thereof, and that the said E——— F——— then was and now is a nonresident of the state of West Virginia. C——— D———.

Taken, sworn to and subscribed before me in my said county this ——— day of ———, 19—.

A——— B———,
Notary Public [*or other officer*].

[*If a notary public, state when commission will expire.*][31]

[*If the oath be administered outside of West Virginia, impress here the official seal of the officer.*]

[31] The statute provides that process or a notice may be served personally on a nonresident, in lieu of proceeding by an order of publication; but the return must state (1) the time and (2) the place of service, and also (3) that the person served is a nonresident. Furthermore, it must (4) be under oath. W. Va. Code, 1913, c. 124, § 13.

CHAPTER XXXVIII

ORIGINAL BILLS

§ 924. Some further observations as to forms.
§ 925. To recover back purchase money on a deficiency in the quantity of land sold.—Abatement of purchase money.
§ 926. To recover back purchase money on a deficiency in the quantity of land sold.—Short form.
§ 927. For an account of partnership dealings, the appointment of a receiver, and for an injunction.
§ 928. For alimony (maintenance) without divorce.
§ 929. For annulment of marriage on the ground of duress.
§ 930. For the annulment of marriage on the ground that the defendant had a former wife living at the time of the second marriage.
§ 931. In an attachment suit.
§ 932. For the establishment of the boundaries to real estate in cases wherein they have become confused.
§ 933. For the cancellation of a tax deed as creating a cloud upon title to real estate.
§ 934. To cancel a deed carrying apparent title as creating a cloud upon the title of the plaintiff.
§ 935. To cancel contract of sale as creating cloud upon title to real estate.
§ 936. For the cancelling or rescission of an instrument on the ground of fraud.
§ 937. For the cancellation of a written instrument on the ground of undue influence.
§ 938. For the cancellation of a written instrument on the ground of mental incapacity.
§ 939. For the cancellation of a written instrument because of infancy.
§ 940. For the cancellation of a written instrument because of the fiduciary relationship of the parties.
§ 941. For the cancellation of a written instrument because of drunkenness.
§ 942. To carry decree into execution.
§ 943. For contribution among cosureties.
§ 944. For the dissolution of a corporation in a court of equity.
§ 945. In a creditor's suit against the estate of a decedent.
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§ 947. In a creditors' suit enforcing judgment lien.

§ 948. In a creditors' suit by an executor or administrator to subject the real estate of the decedent to the payment of his debts.
§ 949. To have an instrument in the form of a deed declared to be a mortgage.
§ 950. Of discovery merely.
§ 951. Of discovery in aid of defense at law.
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§ 953. For divorce on the ground of impotency.
§ 954. To obtain a divorce *a vinculo matrimonii* because of penitentiary sentence.
§ 955. To obtain a divorce from the bonds of matrimony because of conviction of an infamous offense.
§ 956. To obtain a divorce from the bonds of matrimony because of three years' desertion.
§ 957. To obtain a divorce from the bonds of matrimony because of pregnancy at the time of marriage.
§ 958. To obtain a divorce from the bonds of matrimony where the wife has been notoriously a prostitute before marriage.
§ 959. To obtain a divorce *a mensa et thoro* for cruel treatment.
§ 960. To obtain a divorce *a mensa et thoro* because of reasonable apprehension of bodily hurt.
§ 961. To obtain a divorce *a mensa et thoro* because of abandonment or desertion.
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§ 963. For dower in an ordinary suit by a widow.
§ 964. For dower by widow against an alienee of a former husband.
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§ 966. To set aside a fraudulent conveyance.
§ 967. To set aside fraudulent conveyance by corporation made to secure some of its officers.
§ 968. To set aside voluntary conveyance to the prejudice of the rights of creditors.
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§ 970. To set aside a conveyance or transfer so far as the same creates a preference.
§ 971. By guardian to sell lands of an infant in Virginia.
§ 972. By a guardian to sell lands of an infant in West Virginia.
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§ 974. By guardian to lease infants' lands in West Virginia.
§ 975. Against guardian and his surety by ward, after attaining majority, for a settlement and final accounting.
§ 976. Of injunction to judgment at law.
§ 977. For injunction against cutting timber pending an action of ejectment.
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§ 979. Of injunction to judgment at law on the ground of after-discovered evidence.
§ 980. Of injunction against laying gas pipe on the plaintiff's premises.
§ 981. Of injunction by mortgagee or *cestui que trust* against a mortgagor or grantor in trust deed, inhibiting the latter from cutting timber on the mortgaged or trust premises.
§ 982. Of injunction by receiver restraining interference with property in his possession.
§ 983. To enjoin the erection of a nuisance.
§ 984. To enjoin a nuisance by fouling a watercourse.
§ 985. To enjoin the sale of property under a trust deed.
§ 986. To enjoin sale of property under deed of trust to secure payment of money borrowed from building and loan association.
§ 987. To enjoin a municipal corporation from the creation of an illegal indebtedness.
§ 988. To restrain the collection of an illegal tax.
§ 989. To restrain and inhibit the extraction of oil or gas from the lands of the plaintiff.
§ 990. To restrain the taking of private property for public use without compensation.
§ 991. Against an executor by legatees and the administrator of a deceased legatee, for the payment of their legacies and shares of the residuary personal estate.
§ 992. To restrain and inhibit laborers and members of labor organizations from molesting or injuring the plaintiff in the conduct of his business.
§ 993. Bill of interpleader.
§ 994. Of committee of insane person to sell such person's estate.
§ 995. To impeach a decree on the ground of fraud.
§ 996. In a suit upon a lost instrument.
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§ 998. To enforce a laborer's lien against a corporation.
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§ 1000. To enforce a vendors' lien.
§ 1001. For partition.
§ 1002. For partition and account.
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§ 1004. For the dissolution of a partnership and for an injunction.
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§ 1006. To reform or correct a writing on the ground of mistake.
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§ 1008. For specific performance by vendor against vendee.
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§ 1013. By a trustee to obtain the advice of the court touching his duties, and for an auditing of his accounts.
§ 1014. For the establishment and enforcement of a trust.
§ 1015. To set aside a will.—General form.
§ 1016. To set aside a will on the ground of undue influence and mental incapacity.
§ 1017. To construe a will.
§ 1018. To perpetuate testimony.
§ 1019. To take testimony *de bene esse.*

§ 924. Some further observations as to forms.

In this chapter on the subject of forms are presented the essential frames and requisites of original bills in all those cases of ordinary chancery practice, as well as some that are only of rare or occasional occurrence. Under the practice in the *Virginias,* however, little regard is given to form, the courts striving continually after substance, treating matter of form as of secondary consideration, and attaching very little, if any, importance to it.[1] The draft, therefore, of a bill in equity is stripped of its precise formalities and is made to assume a plain and concise statement of the facts upon which the plaintiff bases

[1] As aptly observed by Snyder, J., in Martin v. Smith, 25 W. Va., at p. 583, "in this State and Virginia it has been held that a literal compliance with forms is not required by courts of equity. They regard substance rather than mere form, and so mould and treat pleadings as to attain the justice of the case. Under this rule, a petition for a rehearing has been treated as a bill of review when the facts made it necessary to so regard it, and a notice to correct a decree on bill taken for confessed has been treated as a petition for a rehearing. *Kendricks* v. *Whitney,* 28 Gratt. 646. A bill of review has been treated as an original bill, or a petition in the nature of an original bill. *Hill* v. *Bowyer,* 18 Gratt. 346; *Mettert* v. *Hagan, Id.,* 231; *Sturm* v. *Fleming,* 22 W. Va. 404; *Riggs* v. *Armstrong,* 23, *idem,* 760." See also the timely remarks of the same learned judge in Sturm v. Fleming, 22 W. Va., at pp. 412, 413. See Pethel v. McCullough, 49 W. Va. 520, 39 S. E. 199; Law v. Law, 55 W. Va. 4, 46 S. E. 697; Columbia Finance & Trust Co. v. Fierbaugh, 59 W. Va. 334, 337, 53 S. E. 468; Jones v. Crim & Peck, 66 W. Va. 301, 303, 66 S. E. 367; McLanahan v. Mills, 73 W. Va. 246, 253, 80 S. E. 351; Fidelity Trust Co. v. Davis Trust Co., 74 W. Va. 763, 766, 83 S. E. 59.

his claim to relief. It is also an ever-increasing tendency of the courts to throw off all redundancy of averment and useless verbiage in the construction of pleading, and to make it embody a clear and concise statement of fact. But while this is true, the courts are much inclined to indulge litigants in cases wherein the bounds of a plain and essential statement of the case are exceeded, and unnecessary matter becomes blended with that which is essential. This is generally called surplusage and does not offend against valid equity pleading. Care, however, must be observed not to carry such matter to the extent of multifariousness, as in such case the pleading would be bad.[2] The first division of the subject of forms [3] presents the title, address and commencement of a bill in equity in the usual formal manner, and in the draft of a bill under our present practice, may be used or not, at the option of the pleader. It is usual now with the practitioner in equity to employ a shorter and simpler form in the title and commencement of a bill. Thus, in *West Virginia,* the draft of the bill usually follows the form prescribed by statute,[4] which will be given hereafter in some of the forms in this division; while in *Virginia,* the form of the bill is also much simplified, as will likewise be shown.

No. 72.

§ 925. To recover back purchase money on a deficiency in the quantity of land sold—Abatement of purchase money.

The bill of complaint of A. B. against C. D., filed in the circuit court of ——— county.

The plaintiff complains and says that,* [5] in consideration of the sum of ——— dollars, the defendant sold and conveyed to

[2] *Ante,* § 152.

[3] *Ante,* §§ 906-923.

[4] *Ante,* Form No. 18, which shows the title or caption of the bill in this division; while in *Virginia,* the form of the bill is also much simplified, as will likewise be shown.

[5] This form to the * is the one prescribed by the statute of West Virginia. W. Va. Code, 1913, c. 125, § 37.

the plaintiff by deed of general warranty,[6] bearing date the ——— day of ———, 19—, a tract of land situate in the district of ———, in the county of ———, and state of ———, represented by the defendant to contain ——— acres, and which tract of land is bounded and described as follows: [*Here insert the boundaries of the land.*]

The plaintiff further complaining says that, before he purchased said land and before the execution and delivery of said deed conveying the same to the plaintiff, the said defendant represented and warranted said tract of land to contain ——— acres as aforesaid,[7] and plaintiff believed and relied upon said representation and warranty made to this plaintiff by said defendant, and so relying thereon, plaintiff was thereby induced to believe, and did believe, that said tract of land contained the said ——— acres, and accordingly relying upon the truth of such representation and warranty the said plaintiff purchased said tract of land as and for a tract warranted to contain ——— acres and paid the entire purchase money for the same.

The plaintiff further complaining says that, after the said deed was delivered by said defendant and the said purchase money paid to him, the said defendant, this plaintiff, by actual survey, ascertained that said tract contains only ——— acres, so that there is a deficiency in the quantity of said land of ——— acres; that such deficiency, according to the average value per acre of the said entire tract,[8] is of the value of ——— dollars.

The plaintiff further complaining says that, by reason of said deficiency in the quantity of real estate, and the said warranty made to said plaintiff by said defendant that said tract of land

[6] The sale must be with covenants of warranty, either express or implied. Hogg, Eq. Princ., §§ 5-11; Cummings v. Hamrick, 74 W. Va. 406, 82 S. E. 44.

[7] See Hogg, Eq. Princ., p. 13; Cummings v. Hamrick, 74 W. Va. 406, 82 S. E. 44.

[8] As to the rule determining the amount of the abatement or compensation for the deficiency in the quantity of land sold, see Hogg, Eq. Princ., § 14; McComb v. Gilkeson, 110 Va. 406, 66 S. E. 77, 135 Am. St. Rep. 944.

contains ——— acres, which warranty so made is false and fraudulent, the said defendant in equity and good conscience is indebted to said plaintiff in the said sum of ——— dollars, which the defendant has not paid and which he declines and refuses to pay, although this plaintiff has demanded payment thereof from the said defendant.

The plaintiff therefore prays that he may have a decree against the said defendant for the payment of said sum of ———dollars,* and he also asks such other and general relief as the court may see fit to grant.[9] A. B.,

G. H., Solicitor. By Counsel.

[9] The prayer for general relief from the * to the conclusion is in the form prescribed by the statute of West Virginia.

The form given above is taken from Kelly v. Riley, 22 W. Va. 247, which decides that "where a person has made a sale of land in gross, at a specified price, upon an unqualified statement that it contains a definite quantity or specified number of acres, it will be held *prima facie* that the vendee was influenced to pay or agree to pay the price specified because of such statement; and if it is afterwards established that there is a deficiency in the quantity in excess of what may be rightfully attributed to the usual inaccuracies in surveying, the vendor, in the absence of all other proof, will be presumed to have committed a fraud on the rights of the vendee by such statement of the quantity, and a court of equity will for this reason grant relief to the vendee for such deficiency." See Garrett v. Goff, 61 W. Va. 221, 235, 56 S. E. 351.

See Meek v. Spracher, 87 Va. 162, 12 S. E. 397, wherein the following points are decided: In a suit by the vendee of land for an abatement in the purchase price on account of deficiency in the quantity of the land, a person who, though not named in the contract of sale, was, as the vendor knew, to receive part of the land, and who gave his bond for part of the purchase money, is a proper party defendant; and it is proper to overrule the vendor's demurrer to the bill for misjoinder of such defendant.

In Boshen v. Jurgens, 92 Va. 756, 24 S. E. 390, the court holds that equity has jurisdiction of an action by the purchaser of land based on mutual mistake or fraud to recover back part of the purchase money by reason of the tract containing less land than it was sold for.

In the course of his opinion in this case, delivered by Keith, P., concurred in by all the other members of the court, the learned judge says: "The Virginia decisions, however the law may be elsewhere, abundantly sustain the jurisdiction of a court of equity in such cases. See *Blessing* v. *Beatty*, 1 Rob. 287; *Crawford* v. *McDaniel*, 1 Rob. 448; *Triplett* v. *Allen*, 26 Gratt. 721;

No. 73.

§ 926. To recover back purchase money on a deficiency in the quantity of land sold—Short form.

State of ———,

County of ———, to-wit:

In the Circuit Court of said County.

To the Hon. ——— ———, Judge of said Court:

Your orator, A. B., complaining showeth unto the court that defendant, C. D., on or about the ——— day of ———, 19—,

Watson v. *Hoy*, 28 Gratt. 698; *Benson* v. *Humpreys*, 75 Va. 196.

"These authorities not only show that equity will take jurisdiction of this class of cases, upon the ground of mistake, but that 'every sale of real estate, where the quantity is referred to in the contract, and where the language of the contract does not plainly indicate that the sale was intended to be a sale in gross, must be presumed to be a sale per acre; that, while contracts of hazard are not invalid, courts of equity do not regard them with favor. The presumption is against them, and, while such presumption may be repelled, it can only be effectually done by clear and cogent proof; that the burthen of proof is always upon the party asserting a contract of hazard, for the presumption always being in favor of a sale per acre, a sale in gross, or contract in hazard, must be clearly established by the facts; that where the parties contract for the payment of a gross sum for a tract or parcel of land, upon the estimate of a given quantity, the presumption is that the quantity influences the price to be paid, and that the agreement is not one of hazard; that whether it be a contract in gross or for a specific quantity depends, of course, upon the intention of the contracting parties, to be gathered from the terms of the contract, and all the facts and circumstances connected with it. But in interpreting such contracts the courts, not favoring contracts of hazard, will always construe the same to be contracts of sale per acre, wherever it does not clearly appear that the land was sold by the tract and not by the acre.' "

In such a suit, an allegation that defendant assured plaintiff that the tract contained 800 acres, of which 300 acres were cleared; that plaintiff relied on such assurance, and was induced thereby to make the purchase; that this assurance was false, in that the tract contained less than 700 acres, of which only about 158 acres were cleared; and that defendant knew that this assurance was false when he made it —constitutes a sufficiently clear and specific charge of fraud. Meek v. Spracher, *supra*.

See Castleman's Admr. v. Castleman, 67 W. Va. 407, 68 S. E. 34, 28 L. R. A. (N.S.) 393, as to the jurisdiction of equity to grant relief in such cases.

in consideration that the plaintiff would buy of him, the said defendant, a farm of land, situate in the district of ———, in the county of ———, and state of ———, and pay unto him, the said defendant, the sum of ——— dollars, as the purchase price of said land, falsely and fraudulently represented and stated to this plaintiff that the said farm contained ——— acres of land; and that the plaintiff paid the said sum of ——— dollars to the said defendant as the purchase price of said land, and the said defendant conveyed the same to this plaintiff by deed with covenants of general warranty, all of which will more fully and at large appear by reference to the said deed itself, an attested copy of which is herewith filed marked "Exhibit A," and made part of this bill.

Your orator further showeth unto the court that he relied upon said representations and statements of the defendant, and did purchase and pay for the said farm at the price above specified, relying on said representations and allegations and believing them to be true; but your orator avers that said representations and allegations were and are untrue, that said farm contains only about ——— acres of land, and that plaintiff ought to recover from the said defendant the sum of ——— dollars, being the difference in the amount of the purchase money actually paid by this plaintiff to the said defendant, and that which this plaintiff should have paid by reason of the deficiency in the quantity of land in the farm aforesaid, which sum of ——— dollars the said defendant declines and refuses to pay.

Your orator therefore prays that the said C. D. may be made a party defendant to this bill and required to answer the same; and that said plaintiff may have a decree for the payment of the said sum of ——— dollars, and that he may have such other, further and general relief as to equity may seem meet and as in duty bound he will ever pray, etc. A. B.,

By Counsel.[10]

G. H. M.,

Solicitor for the Plaintiff.

[10] The above form is based upon a similar one found in 2 Thornt., Ind. Pr. Forms, 916.

No. 74.

§ 927. For an account of partnership dealings, the appointment of a receiver, and for an injunction.

State of ———,
County of ———, to-wit:

To the Hon. ——— ———, Judge of the Circuit Court of the said County:

The bill of complaint of A. B., plaintiff, against C. D., defendant, filed in the said court.

Your orator, A. B., respectfully represents unto Your Honor that on the ——— day of ———, 19—, your orator and said C. D. entered into a general copartnership for the purpose of carrying on a general wholesale and dry goods business at [*here insert name of the place*], the same to be carried on under the firm name and style of B. & D.; that your orator engaged to, and did, bring into said business the sum of ——— dollars, was to receive two-thirds of the profits, and, in the same proportion, to share the losses of said business; and that the said C. D. engaged to, and did, bring into the said business the sum of ——— dollars, was to receive one-third of the profits, and was to share the losses of said business in the same proportion; that the said copartnership business was commenced on [*here insert the date*] and was continued from that date until [*here insert the date*], when the same was dissolved by mutual consent; that during the continuation of said copartnership business a large amount of goods were sold by the said firm to various parties on a credit, and the said business remains unsettled.

Your orator further represents unto Your Honor that no settlement of said copartnership business has ever been made between your orator and the said C. D.; that since the expiration of the term of the said partnership your orator has repeatedly applied to the said C. D. to come to a final settlement and adjustment with respect thereto. And your orator well hoped that the said C. D. would have complied with your orator's reasonable request in that behalf, as in equity and justice he

ought to have done. But the said C. D. declined, and absolutely refuses so to do.

Your orator further represents that the said C. D. has taken possession of the partnership books of the said firm, has collected a large amount of the accounts due and owing to the same, has refused to permit your orator to see and inspect said books of account, and wholly refuses to render to your orator any account of the copartnership moneys received by him and to apply the same to the payment of the debts of the said firm.

Your orator further represents that, upon a just and true settlement of the accounts of the said partnership business, it would appear that there is a large balance due from the said C. D. to your orator in respect of the said business.

Your orator further represents that the said C. D. is using the funds of the said copartnership in rash speculations on his own account, and is thereby in danger of drifting into insolvency; and your orator fears and charges that he is in danger of losing the amount so due him from the said C. D. in respect to the said copartnership dealings and transactions. By reason whereof, the said C. D. ought to be enjoined and restrained by the injunction of this honorable court from further collecting the said copartnership accounts, and from using and further applying the funds of said firm to his own use; and some suitable person ought to be appointed by this honorable court to receive and take charge of the books of account of the said firm, and to collect the accounts due the same.

For as much, therefore, as your orator is without adequate remedy in the premises, except in a court of equity, your orator prays that the said C. D. be made a party defendant to this bill, and may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived;*[11] and fully set forth a true and just account of all his

[11] In *West Virginia*, the practice of a waiver of the oath to an answer does not obtain, inasmuch as an answer is not put in under oath unless the bill is also under oath. In Virginia, as we have seen (*ante*, § 434), an answer must be under oath unless waived by the plaintiff, which he may do in his bill, as shown in the above form. However,

actings and doings in respect to said copartnership business since the expiration thereof; and that an account may be taken, under the direction of this honorable court, of all and every the said copartnership dealings and transactions, and that the same may be fully adjusted, and the respective rights of your orator and the defendant ascertained; and that the defendant may be decreed to pay to your orator what, if anything, shall appear upon such account to be due from him; your orator being ready and willing, and hereby offers, to pay to the defendant what, if anything, shall appear to be due to the defendant from your orator; and that some proper person may in the meantime be appointed by the court as receiver, to take charge of the said partnership books of account, and collect whatever money or property may belong or be due to the said firm.

And your orator also prays Your Honor to grant unto him an injunction, restraining and inhibiting the said C. D., his agents and attorneys, from collecting or receiving any of the debts due and owing to the said firm and from using and applying any of the copartnership funds to his own use until the further order of the said court.

And grant unto your orator such other and further relief in the premises as equity may require and to Your Honor may seem meet.

A. B.,
By Counsel.

J. D. C.,
Solicitor for Complainant.

[*Append the affidavit required for the verification of a pleading, as shown in form No. 259, if the suit be in West Virginia, and append that of No. 263, if it be in Virginia.*][12]

even in *West Virginia*, the plaintiff may waive the oath to an answer even though his bill is sworn to if he so desires.

[12] The above form is taken from Puterbaugh, Ch. Pl. and Pr. (3d Ed.), 411.

When partnership accounts are referred to a commissioner, the court will rule the parties to produce before him any books and papers which may relate to the partnership, but will direct the commissioner to disregard such parts as relate to the private affairs of either party. Calloway & Steptoe v. Tate, 1 Hen. and Mun. (Va.) 9.

In a settlement of accounts be-

No. 75.

§ 928. For alimony (maintenance) without divorce.

[*After the proper caption and commencement proceed as follows:*]

The plaintiff, whose maiden name was ———, was married to the defendant on or about the ——— day of ———, 19—, in the county of ———, state of ———, as will more fully appear from a duly certified copy of the record of said marriage, herewith filed as a part hereof, marked "Exhibit No. 1"; that the issue of said marriage is one child, born on the ——— day of ———, 19—.

Plaintiff further says that on or about the ——— day of ———, 19—, defendant sent plaintiff away from him [*or* abandoned and deserted plaintiff, without any just cause therefor, *as the case may be*] and has ever since refused to permit her to return [*or* to return to her, *as the case may be*], contributing to her support and maintenance separately and apart from himself [*or*, contributing nothing to her support].

Plaintiff further says that in the month of ———, 19—, said defendant ceased further to provide for the support of the said plaintiff and child; that at no time since has defendant contributed or offered to contribute in any way for the support and maintenance of said plaintiff.

Plaintiff further says that she is entirely without means to support herself and child during the pendency of this suit; that she is without means to carry on the same; that her child, a

tween copartners, the books of the copartnership are admissible evidence, and vouchers for every item need not be produced. Brickhouse v. Hunter, Banks & Co., 4 Hen. and Mun. (Va.) 363.

Under the ancient equity practice, where one sued for an accounting, it was necessary to offer in his bill to do equity by an averment of his willingness to pay any balance that might be found owing from him to the defendant, but such averment has for many years been presumed, and the bill is not defective if the same is omitted therefrom. Craig v. Chandler, 6 Colo. 543, 46 Pac. 633; Continental Divide Min. Invest. Co. v. Bliley, 23 Colo. 160; Wells v. Strange, 5 Ga. 22; Hudson v. Barrett, 1 Pars. Eq. Cas. (Pa.) 414.

daughter, now ——— years of age, is wholly dependent upon plaintiff for support, maintenance, care and education.

Plaintiff further says that the defendant is a man of means, earns at least the sum of ——— dollars per month, and possesses money and property of great value. [*Here describe the property possessed by the defendant.*]

Plaintiff therefore prays that the said defendant may be required to pay to her, this plaintiff, a reasonable sum for her maintenance and support during the pendency of this suit, and such further sum as will enable her to carry on the same, and that on the final hearing of this cause she may be decreed a reasonable alimony and maintenance out of the property and income of the said defendant and the costs of this suit; and that she may have such other and further relief as to equity may seem meet and as in duty bound she will ever pray, etc.

C. J. H.,
Solicitor for Plaintiff.

Augusta Allen,
By Counsel.[13]

[13] The above form is taken substantially (though with modifications partly suggested by Lang v. Lang, *infra*) from the record in the case of Earle v. Earle, 27 Neb. 277, 43 N. W. 118, 20 Am. St. Rep. 667, which holds that, independently of statutory authority courts of equity have the power to enforce the legal duty of a husband to support his wife and child in a suit by the wife for alimony, without reference to whether the suit is for a divorce or not. The same doctrine is announced in Hogg, Equity Pr., § 444. See in this connection the case of Harding v. Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310.

In Garland v. Garland, 50 Miss. 694, in which there is a pretty general review of the cases, the court says: "Courts of equity in America should always interpose to redress wrongs when the complainant is without fair and adequate and complete remedy at law. Here there is no such process as *supplicavit*, nor a distinct proceeding for restitution of the conjugal relation. If a wife is abandoned by her husband, without means of support, a bill in equity will lie to compel the husband to support the wife, without asking for a decree of divorce." See also Almond v. Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781; Purcell v. Purcell, 4 Hen. and Mun. (Va.) 506; Jelineau v. Jelineau, 2 Desaus Eq. (S. C.) 45; Prince v. Prince, 1 Rich. Eq. (S. C.) 282; Graves v. Graves, 36 Iowa 310, 14 Am. Rep. 525; 2 Bishop on Marriage and Divorce, §§ 354 *et seq.*; Glover v. Glover, 16 Ala. 440; Wray v. Wray, 33 Ala. 187.

Our own court recently has adopted in full the doctrine sanctioned by the cases cited above.

No. 76.

§ 929. For annulment of marriage on the ground of duress.

[*After the proper caption and commencement proceed as follows:*]

I. The plaintiff is now, and has been for more than one year immediately preceding the institution of this suit, a resident of the state of ———, and a citizen of the United States of America and an actual *bona fide* citizen of said state, and is now a resident of the county of ———, in said state, being the county and state in which the said defendant resides.

II. Plaintiff further says that plaintiff married the defendant on the ——— day of ———, 19—, in the county of ———, and state of ———, as will more fully appear from the record of his said marriage, an attested copy whereof is herewith filed, marked "Exhibit A," and made part of this bill.[14]

"We hold that equity has jurisdiction to decree alimony or maintenance to a wife, independently of our divorce statutes. Out of the great contrariety of opinion on the point, we choose that which seems best to accord with reason and justice. Indeed, we adopt the view which is now recognized by the current of authority in the United States, whatever may be said in some of the older encyclopedias and text books. An extended critical examination of the subject convinces us that the courts of this country have so rapidly accepted the view which we now approve that the weight of authority is in its favor, though only a few years ago the writers generally announced that the weight was the other way. * * *

"A Virginia chancellor was perhaps the first to promulgate this doctrine. *Purcell* v. *Purcell*, 4 H. & M. 507. Judge Tucker says the decision in that case is sound. Tucker's Com., Book 1, ch. 9, page 101. Justice Story cites it and says: 'There is so much good sense and reason in this doctrine that it might be wished it were generally adopted.' 2 Equity Jurisprudence, *supra*. The doctrine was again affirmed in *Almond* v. *Almond*, 4 Rand. 662. It is distinctly recognized in the opinion in *Latham* v. *Latham*, 30 Grat. 307. Judge Johnson seemingly approves it in *Stewart* v. *Stewart*, 27 W. Va. 167." Lang v. Lang, 70 W. Va. 205, 73 S. E. 716, 38 L. R. A. (N.S.) 950, Ann. Cas. 1913D, 1129, citing many of the cases from other jurisdictions previously cited in this note.

See Huff v. Huff, 73 W. Va. 330, 80 S. E. 846; Chapman v. Parsons, 66 W. Va. 307, 66 S. E. 461, 24 L. R. A. (N.S.) 1015, 135 Am. St. Rep. 1033.

[14] It is necessary that the bill should contain an averment of mar-

III. Plaintiff further says that at the time of plaintiff's said marriage, defendant was pregnant with a child which, for the purpose of inducing plaintiff to marry her, she falsely and fraudulently represented to be the child of plaintiff, but plaintiff was not in fact the father of said child, and consented to such marriage only when threatened by *Richard Roe*, the father of said defendant, with instant death unless he, the said plaintiff, should consent to such marriage, he, the said *Richard Roe*, holding a loaded pistol pointed at said plaintiff at the time plaintiff gave his consent to marry the said defendant, and said plaintiff married said defendant against his, plaintiff's, will under constraint, duress and coercion induced by said threat and menace and would not otherwise, nor of his own free will, have entered into such marriage relationship.

IV. Plaintiff further says that immediately after said marriage plaintiff returned to his father's home, and he has never since cohabited with said defendant, nor had any communication or intercourse with her.

Plaintiff therefore prays that the said marriage may be annulled and declared void and of no effect, and that he may have such other, further and general relief as the court may see fit to grant, and as in duty bound he will ever pray, etc.

J. W. C., Solicitor for Plaintiff.

John Doe, By Counsel.

[*Append the affidavit required for the verification of a pleading as shown in form No. 259.*][15]

riage, and this averment must be proved, as it is jurisdictional in its character. Gray v. Gray, 15 Ala. 779; Farley v. Farley, 94 Ala. 501, 10 So. 646, 33 Am. St. Rep. 141, in which it was held that an averment in a bill for divorce that on a certain day complainant, whose maiden name was ——, was lawfully and legally married unto ——, sufficiently avers the marriage; and in the following cases it is held that the place where the marriage was solemnized should be alleged: White v. White, 5 N. H. 476; Greenlaw v. Greenlaw, 12 N. H. 200; Lattier v. Lattier, 5 Ohio 538.

[15] This form and the following form are prepared to meet the requirements of the West Virginia statute, Code, c. 64, as amended by Acts of 1915, c. 73, and may be readily adapted to the Virginia practice. It should be noted that,

No. 77.

§ 930. For the annulment of marriage on the ground that the defendant had a former wife living at the time of the second marriage.

[*After the proper caption and commencement proceed as follows:*]

The said plaintiff and defendant were married on the ——— day of ———, 19—, in the county of ———, and state of West Virginia, as will more fully appear from a duly certified copy of the record of said marriage, herewith filed as a part hereof, marked "Exhibit No. 1."

Plaintiff further says that the said plaintiff is now and has been a resident of the state of West Virginia for more than one year next preceding the institution of this suit, and is a citizen of the United States of America and an actual *bona fide* citizen of said state, and is now a resident of the county of ———, and state of ———, being the county and state wherein the said plaintiff and defendant last cohabited.

The plaintiff further says that, after her marriage with the defendant, she continued to live with him until the ——— day of ———, 19—, when this plaintiff for the first time ascertained that the defendant had a former wife living at the time of his marriage to this plaintiff.

And plaintiff now charges and avers that the said defendant was, on the ——— day of ———, 19—, lawfully married to ———, in the county of ———, and state of ———, as will

by virtue of the West Virginia statute, as so amended, every pleading filed in such a suit must "be verified by the party in whose name" it is filed. Hence, of course, a bill, or any other pleading, in a suit for divorce or annulment of marriage can not be verified, as in most other chancery suits, by the agent or attorney of the party. W. Va. Code, 1916, c. 64, § 8.

The grounds of venue prescribed in section 7, chapter 64, W. Va. Code, 1916, are jurisdictional and must be alleged in the bill. Failure to allege some one or more of them not only makes the bill demurrable, but renders the whole proceeding, at any stage thereof, subject to prohibition. Jennings v. McDougle, 98 S. E. 162 (W. Va. 1919).

more fully appear from a duly certified copy of the record of said marriage, herewith filed as a part hereof, marked "Exhibit No. 2," and that the said ———, wife of the said defendant, was living and was then still the lawful and legal wife of said defendant when this plaintiff and defendant were married to each other as aforesaid.

Plaintiff now prays that the said marriage celebrated between this plaintiff and the defendant be annulled, declared void and held for naught, and grant unto this plaintiff such other, further and general relief as to equity may seem meet and as in duty bound she will ever pray, etc.

W. O. P., Martha Ridgeway,
Solicitor for Plaintiff. By Counsel.

[*Append the affidavit required for the verification of a pleading as shown in form No. 259.*][16]

No. 78.

§ 931. In an attachment suit.

To the Honorable J. M. S., Judge of the Circuit Court of M——— County, West Virginia:

The bill of complaint of Henry H———, Hannah H—— and W——— G——— M———, late partners, doing business as *Davy Coal Company,* against Mark P——— and F——— M——— B———, late partners, doing business as P——— & B———.

Plaintiffs say: 1st. On the ——— day of ———, 1900, they entered into a contract with the defendants whereby they agreed to sell to defendants, and the defendants agreed to buy from plaintiffs, the entire output of coal to be mined by plaintiffs from their coal mines at *Davy, West Virginia,* during the period of time said contract was to run, excepting only from the operations of said contract such quantities of coal as should be sold by the plaintiffs to the village trade at *Davy, West Virginia.*

[16] See *ante,* note 15.

2nd. Said contract was to run from the ——— day of ———, 1900, to the *1st day of April, 1901*, unless said *Davy Coal Company* should, during that period of time, be sold out, in which case it was understood the said contract was to run only to the date of such sale.

3rd. The price to be paid for said coal was $1.15 per ton, f. o. b. cars at *Davy, West Virginia*, and on the ——— day of each month, beginning with the ——— day of ———, 1901, defendants were to furnish plaintiffs a statement of coal sold and delivered to them by the plaintiffs during the previous month, and payment was to be made on said ——— day of each month as aforesaid, for the coal so sold and delivered to defendants during said previous month, as shown by said statement, and the weight as furnished by the *Norfolk & Western Railroad Company* was to govern mutually.

4th. In pursuance of said contract they sold and delivered to the defendants at the place and within the time aforesaid, from their said mines, a large quantity of coal, to-wit, 704.44 tons, which, at $1.15 per ton, the price agreed to be paid for said coal, amounted to a large sum of money, to-wit, $810.00.

5th. Though these plaintiffs sold and delivered to the defendants under said contract coal in the quantity of 704.44 tons and to the value of $810.00 as above set forth, yet the defendants have failed and refused to pay to the plaintiffs the said sum of $810.00 due them for coal as aforesaid, but have paid them only the sum of $300.00, leaving a balance of $510.00, long since due the plaintiffs, which, though often requested so to do, the defendants have hitherto and still refuse and fail to pay the plaintiffs.

6th. The defendants, Mark P——— and F——— M——— B———, are nonresidents of the state of West Virginia, and said plaintiffs have caused an attachment to be issued from the clerk's office of this, Your Honor's, court, and have had the same levied upon the interest of the said defendant, Mark P———, in certain real estate situated in M——— county, West Virginia.

The said attachment with the officer's return thereon is herewith filed, marked "Attachment," and asked to be treated as part of this bill. Said plaintiffs have also caused to be duly docketed in the office of the clerk of the county court of M——— county, a notice of the pendency of this suit, and the general objects thereof.

7th. Said plaintiffs say they are advised that they are entitled to come into Your Honor's court of equity and enforce the payment of their debt, and that the real estate of the defendant, Mark P———, attached herein, is liable for their said debt.

8th. Plaintiffs therefore pray that a decree may be entered herein, fixing the amount of their debt against the said defendant, and in default of the payment thereof, that the interest of the said defendant, Mark P———, in the land herein attached be sold in satisfaction of said debt, and for general relief. And your plaintiffs will ever pray, etc.

T——— L——— H———,
E——— C——— M———,[17]
Solicitors for Plaintiffs.

No. 79.

§ 932. For the establishment of the boundaries to real estate in cases wherein they have become confused.

[*After the usual title, address and commencement proceed as follows:*]

I. The plaintiff and *Richard Roe, John Fen* and *Richard Den*, the defendants herein, are the owners in severalty of a

[17] The above form is taken almost verbatim from the record in the case of Hall v. Packard, 51 W. Va. 264, 41 S. E. 142, and is a practical illustration of the form of a bill in equity, jurisdiction for which rests upon attachment. In the absence of statute authorizing a suit in equity in which an attachment issues, a court of equity would be without jurisdiction in a case of this kind. To the bill in the case just referred to and from which the form above given was taken, a demurrer was interposed which was sustained by the court below, but on appeal to the Supreme Court of Appeals of West Virginia, the action of the court below was reversed and the demurrer overruled.

certain tract of land in the district of ———, county of ———, and state of ———, and all of the respective subdivisions of said tract are owned by the said plaintiff and the said defendants and are as follows: [*Here describe the subdivisions.*]

II. Plaintiff further says that the boundaries of said tract, through the lapse of time, carelessness of the occupants, and the absence of natural monuments, have become confused and uncertain.

III. Plaintiff further says that the external lines of the entire tract and those describing the several subdivisions of it have been obliterated so that no one of the defendants is occupying his portion of said land according to the original boundaries of his claim, and by reason of this state of affairs, the defendants, *Richard Roe* and *John Fen*, whose subdivisions of the tract are adjacent to that of the plaintiff, are encroaching upon the plaintiff's land.

IV. Plaintiff further says that the plaintiff and all the parties defendant are equally interested in having said boundaries determined in one action in order to avoid a multiplicity of suits at law, which would necessarily have to be resorted to if the relief prayed for in this suit be denied.

Plaintiff therefore prays that this court may determine the external boundaries of said entire tract and the boundaries of the respective subdivisions thereof, and that he may have such other and general relief as the court may see fit to grant.

J. W. E.,
Solicitor for the Plaintiff.

John Doe,
By Counsel.[18]

[18] Equity has no jurisdiction to run boundaries unless some equity is superinduced by act of the parties. Wolcott v. Robbins, 26 Conn. 236; Norris' Appeal, 64 Pa. St. 280; Western Min., etc., Co. v. Virginia Cannel Coal Co., 10 W. Va. 250; Freer v. Davis, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895, approved in Beatty v. Edgell, 75 W. Va. 252, 83 S. E. 903, and in many intervening and subsequent cases. But where it is shown that by the proceedings in equity a multiplicity of actions at law will be prevented and that "the boundaries have become confused by lapse of time, accident or mistake," the case is properly within the jurisdiction of equity. Beatty v. Dixon, 56 Cal. 619.

The form as given above is constructed from the one found in Beatty v. Dixon, *supra*, in which

No. 80.

§ 933. For the cancellation of a tax deed as creating a cloud upon title to real estate.

[*After the usual title and address.*]

Humbly complaining, represent unto your honor, your orators, J——— H——— S——— and J——— G——— M———, that they are the owners of ——— acres of land lying in ——— district, in ——— county, and state of ———, which was conveyed to your orator, J——— H——— S———, by J——— A——— S———, by deed dated *March 7, 1874,* recorded in the office of the clerk of the county court of ——— county, West Virginia, in Deed Book No. ———, at page ———; that said J——— H——— S——— on the same day conveyed an undivided two-thirds thereof to one W——— H——— Y———, by deed recorded in the office of the clerk of the county court of ——— county, West Virginia, in Deed Book No. ———, at page ———; and that C——— R——— S———, the assignee in bankruptcy of said W——— H——— Y———, by deed dated *March 24, 1876,* recorded in the office of the clerk of the county court of ——— county, West Virginia, in Deed Book No. ———, at page ———, conveyed the two-thirds so sold to W——— H——— Y——— to your orator, J——— G——— M———; that on the *13th day of October, 1877,* the clerk of the county court of said county of ———, by a pretended tax deed of that date, recorded in the office of the clerk of the county court of ——— county, West Virginia, in Deed Book No. ———, at page ———, attempted to convey the whole of said land to the defendant, A——— E———; and that on *February 6, 1880,* by deed of that date, recorded in the office of the clerk of the county court of ——— county, West Virginia, in Deed Book No. ———, at page ———, said

case the interests of nineteen defendants were involved.

It may be doubted whether in West Virginia equity would take jurisdiction in the premises, especially if the defendants were only two in number, as is assumed merely for convenience in the form above.

A——— E——— conveyed all his title and interest in the said land to the defendant, W——— W———. Office copies of the deeds above described, if demanded by any party hereto, will be produced and filed herewith, marked for the purpose of identification as Exhibits 1, 2, 3, 4 and 5, respectively.

Your orators further aver that said land was returned delinquent for the alleged nonpayment of the taxes due thereon for the year ———, and that the same was actually sold by the sheriff for taxes alleged to be unpaid upon said land for the year last aforesaid.

Your orators further allege that the land was not, in truth and in fact, delinquent for the nonpayment of taxes thereon for the said year of ———; that the return so made, if any was made, was not true; that the taxes were all paid on the said land for the year of ———, and for the payment of which your orators hold a receipt from the sheriff of the said county of ———, which is herewith filed as "Exhibit A" and made part of this bill.

Your orators further say that they have paid promptly the taxes upon said land at all times, and that they have paid all taxes on said land since the ——— day of ———, and that neither the said A——— E——— nor W——— W——— has paid any taxes thereon since the sale of said land for the alleged nonpayment of taxes in the year last aforesaid, and that said land has never been delinquent at any time for the nonpayment of any taxes whatsoever due thereon.

Your orators therefore pray that the said A——— E——— and W——— W——— be made parties defendant to this bill, and that the said tax deed as of the date of *October 13, 1877,* be canceled and declared to be null and void, and grant unto your orators such other, further and general relief as to equity may seem meet, and as in duty bound your orators will ever pray, etc.

J——— H——— S———,
J——— G——— M———,
By Counsel.[19]

L——— & H———,
Solicitors for the Plaintiffs.

[19] It will be observed that in the above form there is no allegation that the plaintiffs are in possession of the land mentioned in the bill at

No. 81.

§ 934. To cancel a deed carrying apparent title as creating a cloud upon the title of the plaintiff.

The bill of complaint of A. B. against J. K., filed in the circuit court of ——— county, West Virginia.

Plaintiff complains and says that on the ——— day of ———, 19—, E. F., now deceased, being the owner in fee

the time of suit brought. The reason for the omission of this allegation is that in a suit to cancel a tax deed as creating a cloud upon title to real estate, an allegation of the plaintiff's possession is not required, this being an exception to the general rule in such cases. *Ante*, § 122.

It further appears from an allegation in said bill that the defendants have paid no taxes on the said land except for the year that the land was alleged to be delinquent, and on account of which delinquency the land was sold and bought by the defendants. It is a rule of practice obtaining in the Virginias, and in most other states indeed, that where a purchaser at a tax sale has paid any taxes properly due and payable, they must be tendered back to him by the plaintiff before he brings his suit in order to succeed in the cause. Morris v. Roseberry, 46 W. Va. 24, 32 S. E. 1019.

Certified copies of the various conveyances described in the form may be filed as exhibits with the bill, or if not so exhibited, may be offered in evidence, if denied by the answer. Where documentary evidence is voluminous, and not likely to be controverted, it is often expedient not to file such evidence with the bill in the form of exhibits, thus reducing the volume of the record and eliminating costs. In cases where documentary evidence would be necessary in order to support a decree *pro confesso*, or where the allegations of the bill which such evidence supports are likely to be controverted, so that filing exhibits with the bill will preclude or limit the necessity for taking testimony, it is the better practice to support the bill with exhibits. An additional consideration is the fact that a defective bill may be aided by an exhibit filed with it. Of course, the method to be pursued must be determined by the circumstances of each particular case. See Sult v. Hochstetter Oil Co., 63 W. Va. 317, 61 S. E. 307; Columbia Gas & Electric Co. v. Moore, 81 W. Va. 164, 93 S. E. 1051; *ante*, § 156.

Although space may be saved by identifying the exhibits collectively, as in the form above, it is more precise, and therefore a more commendable practice, to identify each exhibit separately immediately after the description of the document and the allegation in the bill to which it relates, as is illustrated in forms No. 81 and No. 82, immediately following, and other forms in this volume.

simple of a certain tract or parcel of land, described as follows [*here describe the same*], by his deed of that date, duly executed and acknowledged, recorded in the office of the clerk of the county court of ——— county, West Virginia, in Deed Book No. ———, at page ———, a certified copy of which is filed herewith, as a part hereof, marked "Exhibit A," conveyed the same described premises to one G. H.; and that afterward, on the ——— day of ———, 19—, the said G. H., by his deed of that date duly executed and acknowledged, recorded in the office of the clerk of the county court of ——— county, West Virginia, in Deed Book No. ———, at page ———, conveyed the said premises to B. B., late of ———, but now deceased, the father of this plaintiff.

This plaintiff further represents that on the ——— day of ———, 19—, the said B. B. departed this life intestate, leaving this plaintiff his only heir-at-law, by means whereof this plaintiff became, and now is, the owner in fee simple of the said premises.

This plaintiff further represents that, up to and at the time of the conveyance from the said G. H. to the said B. B., the said premises were vacant and unoccupied; that soon after this plaintiff's father purchased said lands he took possession thereof and commenced the improvement of the same, and the said premises are now in a full state of cultivation, with a valuable dwelling house, barn and other improvements thereon; and that the same have been in the actual use, occupation and possession of the said B. B. and this plaintiff ever since the said purchase by the said B. B. from the said G. H.

This plaintiff further represents that all the said deeds of conveyance, except the deed from the said E. F. to the said G. H., were duly recorded in the clerk's office of the county court of said county soon after the same were executed and delivered; that the said deed of conveyance from the said E. F. to the said G. H., by some accident or oversight on the part of the said G. H., was not recorded until the ——— day of ———, 19—, and that one J. K., the defendant hereinafter named, who is a speculator in lands and defective titles, discovered, by some

means, that there was no deed on record from the said E. F., deceased, and that there was a link wanting in the chain of this plaintiff's title to said premises, well knowing that this plaintiff was in possession of the same, claiming title thereto in fee, on the ——— day of ———, 19—, made application to D. F. and C. F., the sons and only heirs-at-law of the said E. F., deceased, as it is claimed, the said E. F. then having been dead for a long space of time, and, by some means or representations, procured a quit-claim deed of conveyance from the said D. F. and C. F. as the heirs-at-law of the said E. F. for the said described premises; and on the ——— day of ———, 19—, filed the same for record in the said clerk's office in said county, and caused the same to be recorded therein in Deed Book No. ———, at page ———, a certified copy of which is filed herewith, as a part hereof, marked "Exhibit B"; and, by reason of his said deed being first of record, and in order to annoy and vex this plaintiff in the premises, now sets up and claims title to the said lands as against this plaintiff, but refuses to commence a suit at law against this plaintiff to try title to the said premises.

This plaintiff further represents that the said deed of conveyance of the said D. F. and C. F. to the said J. K., by reason of the same having been first placed on record in the recorder's office of said county, is a cloud upon the title of this plaintiff in said premises, and tends to depreciate the value and sale thereof.

Plaintiff therefore prays that the said deed of conveyance from the said D. F. and C. F. to the said J. K., bearing date on the ——— day of ———, 19—, of record and conveying the said premises as aforesaid, may be set aside and declared void as against this plaintiff, as a cloud upon the title of this plaintiff, and that the said deed may be delivered up to be canceled and that the plaintiff may have such other, further and general relief in the premises as equity may require and as to the court may seem meet.

A. B.,
By Counsel.[20]

J. C. W.,
Solicitor for the Plaintiff.

[20] This form is founded upon a similar one appearing in Putterbaugh, Ch. Pl. and Pr. (3d Ed.), pp. 658-660, and adapted to the

No. 82.

§ 935. To cancel contract of sale as creating cloud upon title to real estate.

[*After the usual title, address and commencement.*]

Your orator, A. B., respectfully represents unto your honor that your orator is the owner of and seized in fee simple of a certain tract or parcel of land situate in the district of ———, county of ———, and state of ———, of which land your orator is in the actual possession and which is more fully described in the deed therefor from L. M. as grantor to your orator as grantee, bearing date on the ——— day of ———, 19—, recorded in the office of the clerk of the county court of ——— county, West Virginia, in Deed Book No. ———, at page ———, an attested copy of which is herewith filed, marked "Exhibit A," and made part of this bill; and your orator was such owner of said land at the time of the inequitable acts of the defendant hereinafter set forth.

Your orator further represents unto your honor that on the ——— day of ———, 19—, one C. D., one of the defendants hereinafter named, applied to your orator and represented that he was the agent of the *Rock River College Association*, and as such was about to purchase lands in the vicinity of the above-described premises, and obtained from your orator a proposition for the sale of said premises, which proposition is in writing and will more fully appear from the said writing itself, a copy of which is herewith filed, marked "Exhibit B," and made part of this bill.

Your orator further represents that the said C. D., at the time of the making of such proposition, requested your orator

simpler form prescribed by the statute of West Virginia, Code, c. 125, § 37, and to the practice obtaining in Virginia. As to jurisdiction in equity for the removal of cloud upon title to real estate, see Hogg, Eq. Princ., §§ 46, 47.

As to the expediency and manner of filing certified copies of the conveyances above mentioned with the bill, see *ante*, form No. 80, and note 19, citing Sult v. Hochstetter Oil Co., 63 W. Va. 317, 61 S. E. 307; Columbia Gas & Electric Co. v. Moore, 81 W. Va. 164, 93 S. E. 1051.

to give him ten days' refusal upon the terms mentioned therein, which your orator refused to do, but did tell him that, if within the next ten days after that he, your orator, should receive an offer to purchase the said premises, he would advise the said C. D. of such offer before selling the same. Your orator further represents that your orator saw the said C. D. almost daily for the next ten days after the making of the said proposition; that the said C. D. never notified your orator during that time of any acceptance of said proposition; and that afterward, on the *30th* day of *January, 1869,* your orator and the said C. D. met, and, by mutual consent, the said proposition was abandoned; that afterward on the *1st day of February, 1869,* your orator contracted to sell an undivided half of the said premises to one E. F.; and afterward on the *10th* day of *February, 1869,* your orator bound himself to convey five acres of the said premises to ——— county, in the state of ———, for the purposes of a *Normal School;* that on the 8th day of the same month, a certain proposed legislative enactment known as the Park Bill passed one branch of the legislature, and was expected to pass the other branch, which enactment would greatly enhance the value of said premises; that afterward, on the 17th day of February, 1869, the said C. D. applied to your orator and offered to pay him ——— dollars, and take a contract for the sale of said premises, which offer your orator declined, and declared the said former proposal abandoned.

Your orator further represents that on the *18th* day of *February, 1869,* the said C. D., in order to defraud your orator, and to compel your orator to make sale of said premises to him under said proposition, wrote, under the said proposal, the following words, to-wit: "The above proposal accepted, and notice given February 18, 1869. C. D." And afterward, on the 26th day of March, 1869, the said C. D. caused the said proposal and acceptance to be recorded in the recorder's office of ——— county, wherein the said premises are situated, a certified copy of which record is filed herewith, as a part hereof, marked "Exhibit C."

Your orator further represents that afterward the said C. D. assigned the said proposal to one G. H., of, etc., another defendant hereinafter named, who now pretends to hold the same as a valid contract with your orator.

Your orator further represents that the said proposal, with the said acceptance thereunder written, and recorded as aforesaid, is a cloud upon your orator's title in the said premises, and has the effect to greatly depreciate the value thereof, and to prevent your orator from making sale of the same.

For as much, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays that the said C. D. and G. H., who are made parties defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived;* and that the said supposed contract may be declared null and void, and as a cloud upon the title to said real estate of your orator may be removed, and be delivered up to be canceled; and that your orator may have such other and further relief in the premises as equity may require, and to your honor shall seem meet.

A. B.,
By Counsel.[21]

M. S. P.,
Solicitor for the plaintiff.

[21] The note to Form No. 73, with reference to the waiver of the oath to an answer, applies here; and in the forms that follow, the allegations as to this matter will be omitted.

The form here given is, in the main, taken from Puterbaugh, Ch. Pl. and Pr. (3d Ed.), pp. 662, 663, which cites the case of Larmon v. Jordon, 56 Ill. 201, which holds that an agreement for the sale of land not accepted within a reasonable time, but which is accepted after the lapse of such time and recorded, constitutes a cloud upon the title of realty which a court of equity will remove.

As to the essential allegations of a bill of this kind, see *ante*, § 122.

As to the different cases of which a court of equity will take cognizance to remove cloud upon the title to real estate, see Hogg, Equity Principles, §§ 46, 47.

As to who are necessary parties to a suit to remove cloud upon title to realty, see *ante*, § 50.

For form of a bill "to remove cloud on mortgagee's foreclosure title caused by a subsequent chancery proceeding," based on Perry v. McDonald, 69 W. Va. 619, 72 S. E. 745, see 3 Whitehouse, Eq. Prac., 2274.

No. 83.

§ 936. For the cancelling or rescission of an instrument on the ground of fraud.

[*After the proper title, address and commencement.*]

I. On the ——— day of ———, 19—, the plaintiff was the owner in fee of a certain tract of land situate in the district of ———, in the county of ———, and state of ———, which is more fully described in a deed to this plaintiff for the said land made by one L. P., which deed bears date as of the ——— day of ———, 19—, and is duly recorded in the office of the clerk of the county court of ——— county, in the state of ———, in Deed Book No. ———, page ———, to which reference is hereby made for a further description of said land.[22]

II. The plaintiff further says that on said day defendant applied to the plaintiff to purchase the same, and as the plaintiff resided at the distance of about five hundred miles from said land and knew nothing of its value, or of the improvements being made in its vicinity tending to enhance the value thereof, he applied to the defendant, who was well acquainted with the same, as to its location and the improvements being made in its vicinity, and that the defendant thereupon informed plaintiff that the land was situate five miles from any settlement, and that he knew of no improvements being made in that vicinity calculated to enhance the value thereof.

III. Plaintiff further says that, relying upon said representations of said defendant, the plaintiff sold and conveyed said land to him for the sum of $———, by deed bearing date on the ——— day of ———, 19—, recorded in the office of the clerk of the county court of ——— county, West Virginia, in Deed Book No. ———, at page ———

[22] The form here given refers to a public record, accessible to all for a description of the real estate mentioned in the deed. This is sufficient for the purposes of the suit, although it is usual to file attested copies of registered or recorded instruments as exhibits with the bill, when they become part of the pleadings as fully as if they were written out *in extenso*. As to the method and expediency of filing exhibits with the bill, see *ante*, § 933, note 19, and cases cited.

IV. Plaintiff further says that at the time when said defendant made said representations the settlement extended to said land, and the city of ———, containing three thousand inhabitants, was less than one mile therefrom, and that said premises, at the time of the execution of said deed, were well worth in cash the sum of $———, of all which the defendant was well aware at the time when he made said false and fraudulent representations, but of which the plaintiff had no knowledge whatever.

V. Plaintiff further says that as soon as plaintiff discovered that said representations were false, to-wit, on the ——— day of ———, 19—, he applied to the defendant and tendered to him said sum of $——— so paid for said premises, and requested him to reconvey the same to plaintiff, which he refused and still refuses to do.

VI. Plaintiff further says that plaintiff therefore brings said sum of $——— into court for the purpose of having the same delivered to the defendant, when he will accept the same and reconvey said premises to the plaintiff.

Plaintiff therefore prays that the deed from this plaintiff to the defendant, bearing date on the ——— day of ———, 19—, of record as aforesaid, whereby said land was conveyed by this plaintiff to the said defendant, be canceled and declared null and void and of no effect whatever, and that the title to the said land be quieted and confirmed in the plaintiff, and grant unto the plaintiff such other and general relief as to equity may seem meet.

A. B.,
By Counsel.[23]

J. D. M.,
Solicitor for the Plaintiff.

[23] This form is based on one found in 2 Thornton, Pr. Forms, at page 1444, and well illustrates the doctrine that equity will cancel an instrument obtained by fraud.

On the subject of the law relating to the canceling of instruments on the ground of fraud, see the following: Jones v. McGruder, 87 Va. 360, 12 S. E. 792; Sands, Suit in Equity (2d Ed.), 646-648; McClanahan v. Ivanhoe Land and Improvement Co., 96 Va. 124, 30 S. E. 450; Wilson v. Hundley, 96 Va. 96, 30 S. E. 492; Fishburne v. Ferguson, 84 Va. 87, 4 S. E. 575; Hogg, Eq. Pr., §§ 166-180, where the subject is discussed.

No. 84.

§ 937. For the cancellation of a written instrument on the ground of undue influence.

State of ———,
——— County, to-wit:

In the Circuit Court of said County, ——— Rules, 19—.

J. M. J., M. E. B., N. M. M., E. W. J., J. K. J. and M. T. J., the latter three of whom are infants suing by their mother and next friend, S. E. J., Plaintiffs,
v.
J. R. A., Defendant. } In Chancery.

To the Honorable ———, Judge of the Circuit Court of said County:

Complaining shew unto Your Honor your orators, J. M. J., M. E. B., N. M. M., E. W. J., J. K. J. and M. T. J., the latter three of whom are infants under the age of twenty-one years, suing by their mother and next friend, S. E. J., that they are the children and heirs at law of J. E. J., deceased, who died intestate on the ——— day of ———, 19—, in ——— county, and state of ———; that on the ——— day of ———, 19—, the said J. E. J., then in life, was the owner of a certain tract or parcel of land, situate in the district of ———, county of ———, and state of ———, containing four hundred acres, and more fully described in a deed held by him therefor and duly of record in the office of the clerk of the county court of ——— county and state of ———, in Deed Book No. ———, at page ———, an attested copy of which is herewith filed as "Exhibit A" and made part of this bill.

Your orators further shew unto Your Honor that on the day and year aforesaid, and for some months prior thereto, the said J. E. J. was more than eighty years old, sick, and greatly enfeebled, both in body and mind, and by reason thereof easily susceptible to the influence, arts, and persuasions of others; and

during said period of time the defendant, J. R. A., who was a near relative of said J. E. J., to-wit [*state the degree of relationship*], well knowing his weak and enfeebled condition as aforesaid, and corruptly contriving and intending to profit thereby, and to defraud the said J. E. J. out of said farm, made frequent visits to him, and by means of continuous, persistent, and undue persuasion and importunity, and undue, corrupt and overpowering influence exercised by the said J. R. A., over and upon the said J. E. J., whereby the said J. E. J. was completely deprived of his free will and power of free agency, so wrought upon the mind and inclinations of said J. E. J. that on the day last aforesaid the said J. R. A. procured from said J. E. J. an agreement in writing, whereby said J. E. J. agreed and undertook, without any consideration therefor whatever at the time paid or given by the said J. R. A., and without the said J. R. A. having promised or agreed to return or pay any reasonable or adequate consideration therefor, to convey to said J. R. A. the lands and farm aforesaid; and pursuant to said agreement, said J. R. A. on said grounds and by said improper and fraudulent means procured from said J. E. J., in consummation of said agreement, certain pretended deeds of conveyance, which were then executed by said J. E. J. to said J. R. A., and which purported to convey in fee simple said lands to said J. R. A.; nor has said J. R. A. ever paid or given any consideration for said deeds whatever; nor were the said deeds executed by the said J. E. J. of his own volition and by his own free agency.

Your orators further represent unto Your Honor that at the time of the execution of the agreement and conveyances aforesaid, said lands were of the value of $———.

Your orators further shew unto Your Honor that neither said agreement nor said pretended deed was the act or deed of said J. E. J., but the same were procured by said J. R. A. through the corrupt, fraudulent, and dishonest practices and means aforesaid, by which the will and intent of said J. E. J. were by the said J. R. A. wholly overpowered and controlled.

Your orators further shew unto Your Honor that at the time said J. E. J. made said deed he had many relatives, who were nearer of kin to him than the said J. R. A., and were the proper subjects of his bounty, which relatives and next of kin are the plaintiffs to this bill.

Your orators further represent unto Your Honor that, after the death of the said J. E. J., and prior to the commencement of this suit, your orators disaffirmed these pretended deeds and agreement and notified the said J. R. A. that the same had been procured by fraud and undue practices aforesaid, and that they would not be bound by the same. Whereupon the said J. R. A. declared he was the exclusive owner of said lands by virtue of said pretended deeds; that he had it solid and proposed to hold the same.

Your orators further represent unto Your Honor that they were in possession of the said land at the time of the death of the said J. E. J., having gone to the home of the said J. E. J., at his instance, about two months prior to his death, and were then living on the said lands and making their home with the said J. E. J., along with their said mother, S. E. J., and the said plaintiffs are now in possession of the said lands, but the said J. R. A. threatens to eject and oust them from the possession thereof under and by virtue of his said pretended deeds.

Your orators further represent unto Your Honor that the said J. R. A. obtained two deeds from the said J. E. J., embracing all of his said lands, one of which bears date on the ——— day of ———, 19—, and the other on the ——— day of ———, 19—, and are recorded in the office of the clerk of the county court of said county, in Deed Book No. ———, at page ———, and in Deed Book No. ———, at page ———, respectively, duly certified copies of which are herewith filed as "Exhibit A" and "Exhibit B," respectively, and made parts of this bill.

Your orators therefore pray that the said deeds, and each of them, and the said agreement, may be canceled, set aside and held for naught as creating a cloud upon the title to said lands.

now owned by these plaintiffs as the sole heirs of the said J. E. J., and grant unto these plaintiffs such other, further and general relief as to equity may seem meet and as in duty bound they will ever pray, etc.

J. M. J., M. E. B., N. M. M., E. W. J., J. K. J., and M. T. J., the last three of whom are infants suing by their mother and next friend, S. E. J.,

By Counsel.[24]

H. & H.,
Solicitors for the Plaintiffs.

[24] The above form will show the allegations usually made in a bill to set aside a deed or other instrument procured by undue influence.

"Undue influence is a species of fraud and so numerous and diversified are the instances wherein it has been exerted, and so wide the field wherein it may work, by reason of the condition and circumstances of the person influenced, that courts of equity have not fettered themselves by the adoption of any fixed or determinate rules prescribing the bounds of legitimate influence, or defining that which is undue. The effects of all acts must depend upon the relations of the parties to them, and the character, strength and condition of each, and be determined by the application of sound sense to each given case. Thus the same or similar acts may be trifling and of no importance in the case of one person and overmastering in the case of another. Notwithstanding, however, this absence of rules, there are a few general principles that the courts have found safe and useful in applying as mere *indicia* of the character of influence in a given case, or, more properly speaking, as *simple rules of evidence* to be applied in determining the question of undue influence. Thus, it is a well-settled doctrine that extreme kindness and attention shown by those interested will not constitute undue influence; nor suggestions and advice addressed to the judgment. But any importunity which can not be resisted is, or may amount to, undue influence." Hogg, Eq. Pr., § 53.

Numerous cases are cited in support of the doctrine just announced in the author's work on Equity Principles.

In Yount v. Yount, 144 Ind. 133, 43 N. E. 138, the court in its opinion says: "Undue influence generally occurs when one of the parties is weak in intellect, or is so situated or related to the other party as to be under his influence. What the relation may be is not material, if confidence is reposed and influence obtained. When one of the parties is old and feeble, illiterate, and weak-minded, from sickness or other cause, very slight circumstances will cast the burden on the other party.

In support of this doctrine just announced, the learned judge cites the following cases: Wray v. Wray, 32 Ind. 126; Ikerd v. Beavers, 106 Ind. 483, 488-490, 7 N. E. 326, and

No. 85.

§ 938. For the cancellation of a written instrument on the ground of mental incapacity.

[*After the proper caption and commencement.*]

These plaintiffs complain and say that on the ——— day of ———, 19—, W——— B———, of ——— county, in the state of ———, died intestate, leaving the plaintiffs and defendants [*here state the kind and degree of relationship existing between the various parties to the suit and the intestate*] as his sole heirs-at-law. And at the time of his death the said W——— B——— was seventy-three years of age.

These plaintiffs further say that the said W——— B——— was seized as owner in fee of a number of tracts of land in said county, containing in all about 2,100 acres.

cases cited; McCormick v. Malin, 5 Blackf. (Ind.) 509; Ashmead v. Reynolds, 134 Ind. 139, 33 N. E. 763, and cases cited, 39 Am. St. Rep. 238, and note on page 244; Stumph v. Miller, 142 Ind. 442, 41 N. E. 812; Harding v. Handy, 11 Wheat. (U. S.) 125, 6 L. Ed. 429; Harding v. Wheaton, 2 Mason (U. S.) 378, Fed. Cas. No. 6051; Parker v. Parker, 45 N. J. Eq. 224, 16 Atl. 537; Giles v. Hodge, 74 Wis. 360, 43 N. W. 163; Hemphill v. Holford, 88 Mich. 293, 50 N. W. 300; Cowee v. Cornell, 75 N. Y. 91, 31 Am. Rep. 428; Greene v. Roworth, 113 N. Y. 462, 21 N. E. 165; Barnard v. Gantz, 140 N. Y. 249, 35 N. E. 430; 1 Story, Eq. Jur., § 239; 2 White & T. Lead. Cas. Eq., 1206-1210, 1230-1250; 2 Pom., Eq. Jur., § 947; 27 Am. & Eng. Enc. Law, 453-459, 461, 489.

In Wray v. Wray, 32 Ind., at p. 133, the following is quoted and approved: "Where a party is weak and enfeebled in mind by reason of age, or from any other cause, and another takes advantage of such weakness, and by any artifice, or cunning, or 'undue influence' he may possess, or by any improper practices, induces such person to execute a contract which in the free use and exercise of his deliberate judgment he would not have entered into, such a contract would be set aside for fraud.

"In 8 Amer. & Eng. Enc. Law, 649, undue influence is defined to be 'any undue improper or wrongful constraint, machination, or urgeney of persuasion, whereby the will of a person is overpowered, and he is induced to do or forbear an act which he would not do, or would do, if left to act freely. It generally occurs where one of the parties is weak in intellect, or so situated or related to the other as to be peculiarly under his influence. It matters not what the relation is, if confidence is reposed and influence obtained.'" And the same

These plaintiffs further say that on the ——— day of ———, 19—, the said W——— B——— signed and delivered a deed to the defendants, J——— B——— and L——— B———, for four valuable tracts of land, two of said tracts known as the Fravel land, another containing 159 acres, and the other tract containing 29 acres, all of which will more fully and at large appear from said deed itself, recorded in the office of the clerk of the county court of ——— county, West Virginia, in Deed Book No. ———, at page ———, an attested copy of which is herewith filed, marked "Exhibit A," and made part of this bill.

These plaintiffs further say that the tracts of land not embraced in said deed and owned in fee by said W——— B——— at the time of his death, are described in three several deeds made to the said W——— B——— by the grantors therein named, recorded in the office of the clerk of the county court of said county, in Deed Books Nos. ———, at pages ——— thereof, respectively, attested copies of the record of which several deeds are herewith filed, marked respectively Exhibits B, C and D, and made part of this bill.

authority, in a note, adds: "Where one of the parties is very old and feeble, illiterate, weak-minded, or intoxicated, very slight additional circumstances of suspicion will cast the burden on the other party."

In Allore v. Jewell, 94 U. S. 506, Mr. Justice Field, speaking for the court, said: "It is not necessary, in order to secure the aid of equity, to prove that the deceased was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that, from her sickness and infirmities, she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances, imposition or undue influence will be inferred. In the case of *Harding* v. *Wheaton*, reported in 2 Mason 378, a conveyance executed by one to his son-in-law, for a nominal consideration, and upon a verbal arrangement that it should be considered as a trust for the maintenance of the grantor, and after his death for the benefit of his heirs, was, after his death, set aside, except as security for actual advances and charges, upon application of his heirs, on the ground that it was obtained from him when his mind was enfeebled by age and other causes. 'Extreme weakness,' said Mr. Justice Story, in deciding the case, 'will raise an almost necessary presumption of imposition, even when it stops short of legal incapacity; and though a contract, in the ordinary course of things,

These plaintiffs further say that, on the ——— day of ———, 19—, when said deed copied in "Exhibit A" was signed and delivered, the said W——— B———, the grantor therein named, was of unsound mind, and not competent to execute a deed; that he was suffering from paralysis, by which he had been stricken down five weeks before his death; that the said W——— B———, at the time when said deed copied in "Exhibit A" was executed, did not possess memory, understanding and mind sufficient to know and appreciate the nature, character and effect of the act of signing and delivering said deed, "Exhibit A," bearing date on the ——— day of ———, 19—, as aforesaid.

These plaintiffs further say that, by reason of the mental condition aforesaid of the said W——— B———, when said deed copied in "Exhibit A" was executed, all the land mentioned in said various Exhibits A, B, C and D, respectively, as aforesaid, descended to these plaintiffs and the said defendants by the laws of descents, and is now held in coparcenary by them, among whom partition thereof should be made.

reasonably made with such a person, might be admitted to stand, yet if it should appear to be of such a nature as that such a person could not be capable of measuring its extent or importance, its reasonableness or its value, fully and fairly, it can not be that the law is so much at variance with common sense as to uphold it.' The case subsequently came before this court [the Supreme Court] and, in deciding it, Mr. Chief Justice Marshall, speaking of this and, it would seem, of other deeds executed by the deceased, said: 'If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interpose in such a case is among its best-settled principles.' *Harding* v. *Handy*, 11 Wheat. 125.

"The same doctrine is announced in adjudged cases, almost without number; and it may be stated as settled law that, whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and reasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside."

Plaintiffs therefore pray that a decree may be made setting aside said deed, a copy of which is filed herewith as "Exhibit A," and for partition of all the land herein described among the parties hereto, according to their said rights and interests therein in the manner provided by law, and grant unto plaintiffs such other, further and general relief as to equity may seem meet, and as in duty bound they will ever pray, etc.

M——— B———,
O——— B———,
and C——— B———,

By Counsel.[25]

C——— J——— H———,
Solicitor for the Plaintiffs.

See also, Spargur v. Hall, 62 Iowa 498, 17 N. W. 743; Davis v. Dean, 66 Wis. 100, 26 N. W. 737; Wartemberg v. Spiegel, 31 Mich. 400; Birdsong v. Birdsong, 2 Head. (Tenn.) 289; Samuel v. Marshall, 3 Leigh (Va.) 567; and Ikerd v. Beavers, 107 Ind. 483, 7 N. E. 326.

In *West Virginia*, the decisions, substantially conforming to the doctrine approved above, hold that the influence must, however, be such as to destroy the free agency of the grantee and to substitute for his will that of another. Teter v. Teter, 59 W. Va. 449, 53 S. E. 779; Ballouz v. Higgins, 61 W. Va. 68, 56 S. E. 184; Bade v. Feay, 63 W. Va. 166, 61 S. E. 348; Woodville v. Woodville, 63 W. Va. 286, 60 S. E. 140; Snedeker v. Rulong, 69 W. Va. 223, 71 S. E. 180; Turner v. Hinchman, 72 W. Va. 384, 79 S. E. 18; White v. Mooney, 73 W. Va. 304, 80 S. E. 844; Crum v. Rose, 74 W. Va. 164, 81 S. E. 719.

But in *Virginia*, the cases go even farther, and hold that the influence "must amount to coercion—practically duress." Kane v. Quillen, 104 Va. 309, 51 S. E. 353; Jenkins v. Rhodes, 106 Va. 564, 56 S. E. 332; Wallen v. Wallen, 107 Va. 131, 57 S. E. 596; Hoover v. Neff, 107 Va. 441, 59 S. E. 428; Wood v. Wood, 109 Va. 470, 63 S. E. 994; Howard v. Howard, 112 Va. 566, 72 S. E. 133; Woody v. Taylor, 114 Va. 737, 77 S. E. 498; Lester's Admr. v. Simpkins, 117 Va. 55, 83 S. E. 1062; Crawley v. Glaze, 117 Va. 274, 84 S. E. 671; Wohlford v. Wohlford, 121 Va. 699, 93 S. E. 629.

[25] While this illustrates the form of a bill used to set aside an instrument made by a person mentally incompetent to execute it, it also embodies the further object of partition as an incident to the suit, which is allowable on that principle of equity jurisprudence which declares that when equity takes cognizance of a cause for any purpose it will retain it and decide all the questions connected with it. Here, the question of the mental capacity of the testator to make the deed in question involves the matter of title, which, in a case like the one shown in the form, may be determined in a court of equity,

No. 86.

§ 939. For the cancellation of a written instrument because of infancy.

[*After the usual caption and commencement.*]

The plaintiff complains and says that on the ——— day of October, 19—, he was the owner in fee simple of a tract of one hundred acres of land situate in Grant District, Jackson County, West Virginia, which was conveyed to J——— B———, the father of this plaintiff, by L——— M———, by deed bearing date on the ——— day of ———, 19—, and duly recorded in the office of the clerk of the county court of said county, in Deed Book No. ———, at page ———, an attested copy of which is herewith filed, marked "Exhibit A" and made part of this bill.

having for its ultimate object the partition of realty. Hogg, Eq. Princp., § 371.

We also refer here to the case of Physio-Medical College v. Wilkinson, 108 Ind. 314, 9 N. E. 167, which was a suit brought by the heirs-at-law of a grantor in a deed to set the instrument aside on the ground of mental incapacity of the testator to make the deed. The allegation there by the plaintiff was that "the grantor was greatly enfeebled and debilitated both in mind and body, so much so that she was of unsound mind and was not of sound and disposing memory and incapable of comprehending the nature of a contract or deed." This allegation was held sufficiently to allege the unsoundness of mind of the grantor at the time the deed in question in that case was made.

In addition to what is elsewhere (*ante*, § 847, and *post*, § 939) said as to restoring the consideration received before a suit can be maintained to cancel or rescind the contract or agreement complained of, and under which the consideration passed, it may be well to state that, "where a contract is honestly made with a person of unsound mind, not judicially so declared, in ignorance of such mental incapacity, and a fair consideration has been paid to him, and used for his benefit, there can be no rescission without an offer to restore the same: but where no such beneficial consideration has been received, there is no necessity for any tender in a suit by the heirs of such insane person to have the contract rescinded." Physio-Med. Col. v. Wilkinson, 108 Ind. 314, 9 N. E. 167.

The following is part of the note to Jackson v. King, 15 Am. Dec. 367, pp. 367, 368: "An important point, as already intimated, which must be considered in determining whether an insane person shall be allowed to avoid or rescind his executed contract, is as to the possi-

The plaintiff, further complaining, says that on the ——— day of ———, 19—, J——— B———, the father of A——— B———, the plaintiff, so being the owner of said land by virtue of said deed, dated on the ——— day of ———, 19—, made and published his last will and testament; that thereafter, on the ——— day of ———, 19—, said J——— B——— departed this life, and his said last will and testament was duly admitted to probate in the office of the clerk of the county court of said county, an attested copy whereof, as well as the order of probate thereof, are herewith filed, marked Exhibits "B" and "C," respectively, and made part of this bill.

This plaintiff, further complaining, says that by said last will and testament the said J——— B——— devised to this plaintiff the tract of one hundred acres of land in said "Exhibit A" mentioned and described.

This plaintiff further says that on the ——— day of October, 19—, the said plaintiff, then being the owner of said land in fee, sold and conveyed the same to the defendant, E. F., for the consideration of five hundred dollars cash in hand paid to this plaintiff, and on that day the said plaintiff signed and delivered a deed to the said defendant, E. F., for the said land, which was duly recorded in the office of the clerk of the county court of said county, in Deed Book No. ———, at page ———, an attested copy of the record of which last-named deed is herewith filed, marked "Exhibit D," and made part of this bill.

bility of placing the parties *in statu quo*. The rescission or avoidance of such a contract is put on equitable grounds; and it is generally held that if there has been no unfairness or imposition, or undue advantage taken, and the insanity was unknown to the other party, the contract will only be avoided upon condition that the party seeking relief will do complete equity by restoring what he has received. *Canfield* v. *Fairbanks*, 63 Barb. 461; *Eaton* v. *Eaton*, 37 N. J. L. (8 Vr.) 108; *Lincoln* v. *Buckmaster*, 32 Vt. 659; *Carr* v. *Holliday*, 5 Ired. Eq. 67; *Arnold* v. *Richmond Iron Works*, 1 Gray 434; *Molton* v. *Camroux*, 2 Exch. 486; 1 Whart. & Stille's Med. Jur., § 9. But it is held in a number of cases that one seeking to avoid a contract on the ground of insanity is not bound to restore the consideration: *Gibson* v. *Soper*, 6

Plaintiff further complains and says that on the said ——— day of October, 19—, this plaintiff was an infant under twenty-one years of age, to-wit, of the age of nineteen years; that plaintiff has now attained his majority, having arrived at the age of twenty-one years on the ——— day of ———, 19—.

This plaintiff, further complaining, says that since attaining to his majority he desires to, and does, disaffirm the said act and deed selling and conveying the said land to the said defendant, and so informed the said defendant and requested the said defendant to reconvey the said land to this plaintiff, which the said defendant declined and refused to do, and still declines and refuses to do, unless this plaintiff shall pay to the said defendant the said sum of five hundred dollars, purchase money as aforesaid, with its interest thereon from the day of its receipt by this plaintiff as aforesaid; but this plaintiff avers that he has spent said five hundred dollars, and that there is no sum thereof remaining in the hands of this plaintiff, and that this plaintiff is unable to repay to the said defendant the said sum of five hundred dollars with its interest thereon, or any part thereof.

Plaintiff therefore prays that said deed may be canceled, declared null and void, and held for naught; that the said defendant may also be required in addition thereto, in order to preserve the chain of title as matter of record in the office of the clerk of the county court of said county, to reconvey the said land to this plaintiff, and grant unto this plaintiff such

Gray 279; *Henry* v. *Fine*, 23 Ark. 417; see also, *Foss* v. *Hildreth*, 10 Allen 76."

The majority of the courts deny the right of an insane person to rescind his contract under such circumstances without offering to make restitution, although the cases are not far from being equally divided. 22 Cyc. 1175, 1176, and cases cited.

The "right of infants and insane persons to avoid their deeds and contracts is an absolute and paramount right, superior to all equities of other persons, and may be exercised against *bona fide* purchasers from the grantee." Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705.

other and further relief as the court may see fit to grant, and as in duty bound he will ever pray, etc.

H. & K., A——— B———,
Solicitors for the Plaintiff. By Counsel.[26]

[26] This form is intended to illustrate the right of an infant to cancel a deed or other instrument made during infancy after attaining to his majority. Usually, in cases of this kind, two questions arise:

First. Whether the suit can be maintained without returning the consideration or property received by the infant.

Second. Whether there has been such acquiescence on the part of the infant as to amount to an affirmance after he has attained his majority.

On the first of these questions, Judge Green, in Gillespie v. Bailey, 12 W. Va., pp. 92, 93, says: "It is clear that if he has the consideration in kind which he received for such land, he must return it to the purchasers when he elects to set aside his contract of sale, or the sale; and in such case it is immaterial whether the contract be executory, or executed; whether he made a deed for the land or not. He must in every case when he avoids a contract executory, or executed, made during his infancy, return any property which he has received as the consideration of the contract, and which he still has in his possession. But if during his infancy he has wasted, sold or otherwise ceased to possess the property which is the consideration of his contract, so that he can not return it, or can not return it except in its deteriorated condition, such inability will not hinder him from avoiding his contract generally. See *Mustard* v. *Wohlford*, 15 Gratt. 343; *Bedinger* v. *Wharton*, 27 Gratt. 857; *Boody* v. *McKinney*, 23 Me. 517; *Price* v. *Ferman*, 27 Vt. 271; *Robbin* v. *Eaton*, 10 N. H. 562; *Fitz* v. *Hall*, 9 N. H. 441.

"A distinction has, as we shall presently see, been taken in some cases between an executory and an executed contract, and it may be regarded as questionable whether the rule above laid down is applicable to executed contracts, though its application to executory contracts seems to be well settled. In the language of Judge Moncure in *Mustard* v. *Wohlford*, 15 Gratt. 343: 'If the infant has delivered possession of the land contracted to be sold by him, he has an unconditional right to recover it back in an action at law; and a court of equity will not restrain him from doing so, nor impose terms on the exercise of his right.'"

The learned judge in the course of his opinion in this case, further says: "In *Smith* v. *Evans*, 5 Humph. 70, it was held in the case of an *executed* sale by an infant, if he disaffirms and seeks to recover back the article sold, he must return the purchase money or other consideration. So also, *Badger* v. *Phinney*, 15 Mass. 359, and in *Hillyer* v. *Bennett*, 3 Edw. Ch. 222, it was further held that if he goes into a chancery court to set aside a conveyance, because executed while

No. 87.

§ 940. For the cancellation of a written instrument because of the fiduciary relationship of the parties

The bill of complaint of G——— W———, B——— F——— W——— and John W——— against A——— G——— R——— and L——— C——— D———, filed in the circuit court of *Mason County*, West Virginia.

The plaintiff complains and says that on the ——— day of ———, 19—, B——— W——— departed this life, after having first made his last will and testament, which was afterwards duly probated in the office of the clerk of the county court of said county, attested copies of which will and the order admitting the same to probate, marked respectively "Exhibit A" and "Exhibit B," are herewith filed and made part of this bill. These plaintiffs further say that by the said will G——— E——— J——— was appointed as executor thereof and qualified as such.

he was an infant, he must offer to restore the purchase money. The Court of Appeals of Virginia, in the case of *Mustard* v. *Wohlford*, declined to express any opinion as to the correctness of the decision in these cases, or any opinion upon the distinction drawn in them, between executed and executory contracts, and in that case only decided that if the contract for sale of land is executory, the infant is not bound, when he disaffirms such contract, to refund the purchase money received by him when an infant. In the case of *Bedinger* v. *Wharton*, 27 Gratt. 857, the court reaffirms the principles laid down in *Mustard* v. *Wohlford;* they say in this case 'that where a contract is *executory* merely, it is very clear that it can be avoided by an infant after attaining lawful age without restoring anything, which may have been received by him in consideration of the contract and may have been consumed by him during infancy, or not remain in his hands on his arrival at lawful age; but whether or not the same principle applies to the case of an executed contract, has never yet been decided by this court,' and they decline again to express any opinion on this point, though an examination of the case will show that the contract in this case was an executed contract, being a deed duly delivered and the land sold, put in the possession of purchasers, and all the purchase money paid."

The West Virginia court, affirming the principles enunciated in Gillespie v. Bailey, *supra*, and the cases cited therein, reasserts the right of the infant to rescind without making restitution, where he has parted with the consideration,

Plaintiffs further say that one X——— Y——— brought suit in chancery against G——— E——— J———, executor as aforesaid, and others, in the circuit court of said county, to subject certain lands of the estate of said B——— W——— to sale for the payment of his debts; and that by a decree duly entered in said suit the defendant, A——— G——— R———, was appointed special commissioner to sell said land; that on the 14th day of October, 19—, the said A——— G——— R———, as said special commissioner, sold a tract of one hundred acres of said land at public auction, as required by said decree, and that one T——— A——— B——— became the purchaser thereof at the price of one hundred and sixty dollars; that on November 19, 19—, said sale was confirmed and by a subsequent decree said commissioner was directed to convey the said land to the purchaser; that said R———, as such special commissioner, did, by deed dated January 11, 19—, convey the said land to the said defendant, L——— C——— D———; and by deed of same date said L——— C——— D——— and wife conveyed the same to the said A——— G——— R———, all of which will more fully and at large appear from said deeds themselves which have been duly admitted to record in the office of the clerk of the county court of said county, in Deed Books Nos. ———, at pages ———, respectively, attested copies of which are herewith filed, marked respectively "Exhibit C" and "Exhibit D," and made part of this bill.

in Britton v. South Penn Oil Co., 73 W. Va. 792, 81 S. E. 525.

In Abernathy v. Phillips, 82 Va. 773, 1 S. E. 113, the court said: "It is undeniably true that if infants enter into contracts, and after becoming of age repudiate their contracts, they must make restitution of the consideration remaining in kind, in their hands."

With reference to the second question, relating to acquiescence on the part of the infant, Green, J., in Gillespie v. Bailey, *supra*, says: "There is an obvious distinction in this respect between the case where an infant has purchased land and retained the possession after attaining his full age, and the case where he has sold land and had after his majority permitted a considerable time to elapse without disaffirming the sale. There are decisions or *dicta* to the effect that the infant must in case of a sale declare his disaffirmance in a rea-

These plaintiffs further complain and say that the sale of said one hundred acres of land by said A——— G——— R——— as commissioner to said L——— C——— D———, was fraudulent and void; that in fact said R——— was the real purchaser of said land, the said L——— C——— D——— having purchased it under a secret agreement and understanding with said R——— that the latter was to become the owner of it; that said R——— has enjoyed the rents and profits of the said land for nearly ten years, and sold therefrom a large quantity of valuable timber worth one thousand dollars, and appropriated the same to his own use; that the said land is worth now not less than the sum of two hundred and fifty dollars, and will sell for that at any time.

sonable time. See *Klein* v. *Bebee*, 6 Con. 494; *Holmes* v. *Blogg*, 8 Taunton 35; *Richardson* v. *Bright*, 9 Ver. 368. But these *dicta* or decisions are contrary to reason and the great weight of authority. The true doctrine is that mere acquiescence where an infant has sold land, though extended to an unreasonable length of time, will not amount to an affirmance: *New Hampshire M. F. I. Co.* v. *Noyes*, 32 N. H. 351; *Irvine* v. *Irvine*, 9 Wallace 626; *Voorhees* v. *Voorhees*, 24 Barbour 153; *Tucker* v. *Mooreland*, 10 Peters 59, and notes thereto; 1 Am. Leading Laws, 316; *Drake* v. *Ramsey*, 5 Ohio 521; *Gressinger* v. *Welch*, 15 Ohio 156; *Boorly* v. *McKinney*, 28 Me. 517.

"But though mere acquiescence for an unreasonable time will not, where an infant has sold land, amount in law to an affirmance of the sale, yet it will amount to such affirmance under certain circumstances—as when the infant has for several years, without any objection to the sale, stood by and seen the purchaser making large expenditures upon the land bought, in valuable improvements. See *Wharton* v. *East*, 5 Yerger 41; *Wallace's Super.* v. *Lewis*, 4 Harrington 75. So, too, though the purchaser has not put valuable improvements on the land bought, still if he has been in actual possession of it for a period (since the infant attained his majority) sufficient to bar its recovery by another, if this possession had been adversary, such acquiescence under these circumstances would legally amount to an affirmance of the sale. See *Drake* v. *Ramsey;* Gressinger v. Lessee of Welch; *Voorhees* v. *Voorhees*, etc.; *Tucker et al.* v. *Moorcland, supra.*" See Hobbs v. Hinton Foundry, etc., Co., 74 W. Va. 443, 82 S. E. 267, Ann. Cas. 1917D, 410, citing Gillespie v. Bailey and many of the cases cited therein and in the notes quoted below.

It is not necessary, that an infant may disavow his act, to do more than to bring his suit for cancelation or rescission thereof within the proper time. Birch v. Linton, 78 Va. 584.

These plaintiffs further say that they are the sole devisees and distributees of the will of said B——— W———, and are interested as such in the sale of said land.

The right to cancel an instrument because of the infancy of one of the parties inures to the benefit of the other party, though such other party may not have been an infant at the time the instrument was executed, if when the infant becomes of age he, himself, disaffirms the act which he did during his minority. McCarty v. Woodstock Iron Co., 92 Ala. 463, 8 So. 417, 12 L. R. A. 136, note, in which are considered the acts necessary to disaffirm an infant's contract.

A further question arises with reference to acts of infants, and that is as to the time an infant has, after arriving at majority, within which he may disaffirm his contracts made during infancy. On this question there is a well-prepared note appearing in Vol. 55, Cent. Law Jour. 492, 493, which is here appended. "On the question thus stated the authorities are irreconcilably in conflict. The majority of the authorities take the broad and liberal attitude announced by the court in the principal case, and hold that the deed or contract of an infant may be avoided at any time after becoming of age, until he is barred by the statute of limitations, provided there has been no word or act on his part indicating assent. Wells v. Seixas, 24 Fed. 82; Lacy v. Pixler, 120 Mo. 383; Donovan v. Ward, 100 Mich. 601, 59 N. W. 254; Gillispie v. Bailey, 12 W. Va. 70, 29 Am. Rep. 381; Gilkerson v. Miller, 74 Fed. 131; Emmons v. Murray, 16 N. H. 385; Hill v. Nelms, 86 Ala. 442; McMurray v. McMurray, 66 N. Y. 175; Davis v. Dudley, 70 Me. 236; Birch v. Linten, 78 Va. 584, 49 Am. Rep. 381; Fox v. Devery, 62 Ark. 316; Cresinger v. Welch, 15 Ohio 156. Thus in Donovan v. Ward, *supra*, two infant heirs joined with their coheirs in the execution of a quitclaim deed of the common inheritance. Several conveyances of the land were made and the lands were in the hands of *bona fide* purchasers when the two heirs, eight years after attaining their majority, brought ejectment to recover their interest in the land. The evidence showed that the plaintiffs learned of the execution of the deed at the time of their majority; that no improvements had been made on the land by any of the holders thereof, nor had either of the plaintiffs done anything indicating an affirmance or ratification of a deed. The court held that disaffirmance under such circumstances would be reasonable if made at any time within the period prescribed by the statute of limitations. The other line of authorities hold that a minor who has made a contract or deed of conveyance must disaffirm his deed within a reasonable time after coming of age, or be barred of the right. Holmes v. Blogg, 8 Taunt. 38; Jamison v. Smith, 35 La. Ann. 609; Hastings v. Dollarhide, 24 Cal. 195; O'Dell v. Rogers, 44 Wis. 136; Goodnow v. Lumber Co., 31 Minn. 468, 47 Am. Rep. 708; Featherson v. McDonald (Canada), 15 N. C. C. P. 162; Richardson v. Pate, 93

Plaintiffs are advised and so aver that the said A——— G——— R———, in his fiduciary capacity of special commissioner, could not become the purchaser either directly or indirectly of said land sold by him as such special commissioner as aforesaid.

Ind. 423; Richardson v. Boright, 9 Vt. 368; Walton v. Gaines, 94 Tenn. 420; Kline v. Beebe, 6 Conn. 494; Wallace v. Lewis (Dela.), 4 Harr. 80; Searcy v. Hunter, 81 Tex. 644, 26 Am. St. Rep. 837. In some cases statutes provide that an infant must disaffirm within a reasonable time. Iowa: Green v. Welding, 59 Iowa 679, 44 Am. Rep. 696; Wright v. Germain, 21 Iowa 585. Georgia: Bentley v. Greer, 100 Ga. 35. Nebraska: Englebert v. Troxell, 40 Neb. 195, 58 N. W. 852, 42 Am. St. Rep. 665. As to what is a reasonable time, there is also an irreconcilable conflict in the authorities. Bingham v. Barley, 55 Tex. 28, recognizes the rule that when mere lapse of time is relied upon to defeat the right of avoiding the deed, it must be such as under all the circumstances will rebut any presumption of any intended disaffirmance. This rule is doubted in Searcy v. Hunter, 81 Tex. 644, which holds that the question of "reasonable time" in such cases is entirely a question of fact to be determined under all the circumstances of each case. In Ward v. Laferty, 19 Neb. 429, three years was held not a reasonable time within which to disaffirm. In Wright v. Germain, *supra*, a minor about 16 years of age exchanged land of his for other land which had a mill on it. The mill was subsequently washed away, without gross carelessness on the minor's part, but without ordinary care. Two years after he reached majority, the last year having been spent in the United States military service, he brought suit to avoid his conveyance. The court held that his disaffirmance was not within a reasonable time. In Englebert v. Troxell, 40 Neb. 195, it was held that a disaffirmance of a deed within one month and three days after reaching majority was within a reasonable time. Three years was, however, held to be a reasonable time in Blankenship v. Stout, 25 Ill. 132. In Keil v. Healey, 84 Ill. 104, it was held that an infant must disaffirm within three years. In Weaver v. Carpenter, 42 Iowa 343, it was held that thirteen years after reaching majority was not a reasonable time within which to disaffirm a deed, even if there were fraud in its execution and the infant did not discover the fraud until that time. In Davis v. Dudley, 70 Me. 236, nine years was held not a reasonable time. Improvements had been made upon the land in this case with the knowledge of the infant. In Ferguson v. Railroad, 73 Tex. 344, 349, it was held that two years was not a reasonable time. In this case the deed was made by the infant only six months before attaining majority, and the grantee did not know nor have any reason to suspect that he was an infant. In Land Co. v. Sanford (Tex.), 24 S. W. 587, four

The plaintiffs therefore pray that the said sale of lands by the said A——— G——— R——— and the purchase thereof by the said L——— C——— D——— as aforesaid may be set aside and held for naught; that the deed from the said L——— C——— D——— and wife to the said A——— G——— R——— may also be set aside and held for naught; that there may be an accounting taken of the rents, issues and profits derived from the said real estate by the said A——— G———

months was held a reasonable time. In O'Dell v. Rogers, 44 Wis. 136, three years was held not unreasonable where the infant had been all the time a nonresident and had no knowledge of any change in the value or situation of the property. Three and one-half months, however, was held a reasonable time in a subsequent case from this state. Thormachlen v. Kueppel, 86 Wis. 378, 56 N. W. 1089."

"An infant's deed may be disaffirmed by subsequent conveyance of the same land by the infant after attaining his majority. *Peterson* v. *Laik*, 69 Am. Dec. 441, and collected cases in note thereto 443; *Youse* v. *Norcoms*, 51 *idem* 175, and note 183; or by an actual entry on the land for the purpose of disaffirming the deed. *Bool* v. *Mix*, 31 *idem* 285; or by doing any act of equal solemnity with the deed. *Breckenridge's Heirs* v. *Ormsby*, 19 *idem* 71; or by doing some other act clearly evincing his intention to defeat the conveyance. *Bool* v. *Mix*, 31 *idem* 285; *Roberts* v. *Wiggin*, 8 *idem* 38. An entry upon the land is not necessary to avoid the deed. *Youse* v. *Norcombs*, 51 *idem* 175." See note to Harrod v. Myers, 76 Am. Dec. 418.

"Conveyances of land by an infant can not be conclusively avoided until after the infant has attained his majority. Note to *Tucker* v. *Moreland*, 1 Am. Lead Cas. 257; Tyler on Inf. & Cov. 66; *Roof* v. *Stafford*, 7 Cow. 183; S. C. 9 *idem* 626; *Bool* v. *Mix*, 17 Wend. 119; *Matthewson* v. *Johnson*, 1 Hoff. Ch. 560; *Hastings* v. *Dollarhide*, 24 Cal. 195; *Dunton* v. *Brown*, 31 Mich. 182; *Dixon* v. *Merritt*, 21 Minn. 196; *Bozeman* v. *Browning*, 31 Ark. 364; *Wallace* v. *Latham*, 52 Miss. 291. Personal contracts, generally, may be avoided either before or after arriving at age. Note to *Tucker* v. *Moreland*, 1 Am. Lead. Cas. 258; Tyler on Inf. & Cov. 68, 69; *Stafford* v. *Roof*, 9 Cow. 626; *Shipman* v. *Horton*, 17 Conn. 481; *Carr* v. *Clough*, 26 N. H. 280; *Willis* v. *Twambly*, 13 Mass. 204; *Bailey* v. *Bamberger*, 11 B. Monroe 113; *Gaffney* v. *Hayden*, 110 Mass. 137; S. C., 14 Am. Rep. 580. But see, *Boody* v. *McKenny*, 23 Me. 517; *Farr* v. *Sumner*, 12 Vt. 28; *Dunton* v. *Brown*, 31 Mich. 182. But by statute in Iowa disaffirmance in any case before majority is of no effect. *Murphy* v. *Johnson*, 45 Iowa 57. As to contracts for personal service by a minor it is held in *Squires* v. *Hydliff*, 9 Mich. 274, and *Spicer* v. *Earl*, 9 Cent. L. J. 186, that so far as the infant has executed such contract without dis-

R———; that the said A——— G——— R——— may have credit thereon for the said purchase money with its interest, together with any and all taxes paid by him on the said real estate; that a decree for the balance may be entered in favor of these plaintiffs against the said A——— G——— R———, and grant unto these plaintiffs such other, further and general relief as the court may see fit to grant, and as in duty bound they will ever pray, etc.

G——— W———,
B——— W——— and
John W———,
By Counsel.[27]

G——— L——— H———,
Solicitor for the Plaintiffs.

sent, he can not, after attaining his majority, disaffirm it, unless it appears to have been fraudulent or unreasonable." See note to Philips v. Green, 13 Am. Dec., at p. 132.

"A conveyance of land may be avoided by an infant by entry, ejectment, writ *dum fuit infra actatem*, by another absolute conveyance after attaining his majority, or indeed by any act manifesting unequivocally his intention to avoid it. Note to *Tucker* v. *Moreland*, 1 Am. Lead. Cas. 257; *Roberts* v. *Wiggin*, 8 Am. Dec. 38; *Irvine* v. *Irvine*, 9 Wall. 617; *Dixon* v. *Merritt*, 21 Minn. 196; *Hastings* v. *Dollarhide*, 24 Cal. 195; *Mustard* v. *Wohlford*, 15 Gratt. 329; *Bool* v. *Mix*, 17 Wend. 120; *Green* v. *Green*, 69 N. Y. 553; *Scott* v. *Buchanan*, 11 Humph. 469; *Drake* v. *Ramsey*, 5 Ohio 251; *Cresinger* v. *Welch*, 15 *idem* 156; *Harris* v. *Cannon*, 6 Ga. 382; *Norcum* v. *Sheahan*, 21 Mo. 25; *Scranton* v. *Stewart*, 52 Ind. 69; *Illinois, etc., Co.* v. *Bonner*, 75 Ill. 315; *Allen* v. *Poole*, 54 Miss. 323. In the case of mere personal contracts 'the avoidance may be by any act clearly demonstrating a renunciation of the contract.' Note to *Tucker* v. *Morcland*, 1 Am. Lead. Cas. 258, and cases cited." See note to Philips v. Green, 13 Am. Dec. 132.

[27] The form above given is formulated from the principles announced in Winans v. Winans, 22 W. Va. 678, and Newcomb v. Brooks, 16 W. Va. 32. In this latter case, after a full and exhaustive examination of the authorities and principles involved in such cases the court held as follows:

"A purchase by a fiduciary, while actually holding a fiduciary relation, of trust property, either of himself or of the party to whom he holds such fiduciary relation, is voidable at the option of the party to whom he stands in such relation, although, the fiduciary may have given an adequate price for the property and gained no advantage whatever.

"A fiduciary can not make a valid purchase of the trust property, though it be made at a public judicial sale under a decree made in an adverse proceeding. Any such purchase may be avoided at

No. 88.

§ 941. For the cancellation of a written instrument because of drunkenness.

[*After the usual caption and commencement.*]

I. The plaintiff and defendant were on the ——— day of ———, 19—, engaged as partners under the firm name and style of A——— B——— & Company, doing a retail dry goods and notion business, which was conducted in the town of Debby, in the county of ——— and state of ———, in which business they had been engaged for ——— years.

II. Plaintiff further says that during the last year or so of the said business he was aware that the sales had greatly decreased, but did not know that they had decreased to the extent of which this plaintiff is now aware, inasmuch as the defendant had personal charge of the business, remaining in the store and buying and selling all the goods handled by them as partners aforesaid.

III. This plaintiff further says that on the said ——— day of ———, 19—, while plaintiff was very drunk, so much so that he did not realize what he was doing nor appreciate or understand any act of business, the said defendant induced this plaintiff to buy his interest in the said store for the sum of six thousand dollars, in settlement and payment of which the plaintiff executed and delivered to the said defendant his two negotiable promissory notes in the sum of three thousand dol-

his option by any party to whom he holds such fiduciary relation.

"If a fiduciary purchases trust property and then resells it to a purchaser for valuable consideration with notice of the character of his title, the person to whom the fiduciary occupied the fiduciary relation may at his option avoid the sale, though the property has passed into the hands of a sub-purchaser with notice.

"But if the sub-purchaser had no notice of the character of his vendor's title, the sale can not be set aside, but the party can have redress against the fiduciary personally to the extent of the profit he made by the resale.

"But when such sales are sought to be avoided, the suit for the purpose must be brought in a reasonable time, though the property remains in the hands of the fiduciary."

lars each, payable in one and two years respectively, with interest, and thereupon the said partnership was dissolved and the said defendant retired therefrom.

IV. This plaintiff further avers that the said defendant induced this plaintiff to become intoxicated with a view to selling to this plaintiff his interest in the said store at the price aforesaid, although this plaintiff did not appreciate and understand the motives and object of the said defendant in inducing this plaintiff to drink to the extent of becoming drunk in the manner hereinbefore alleged until after this plaintiff had become sober and learned to understand and appreciate the situation.

V. This plaintiff further says that the stock of goods on hand pertaining to the said business on the day the said notes were given did not amount to over three thousand dollars, though the said defendant by his false representations and assurances made to this plaintiff while drunk as aforesaid, induced this plaintiff to believe, and this plaintiff did believe, that there were ten thousand dollars' worth of goods in said store, including the outstanding solvent accounts due to the said firm.

VI. Plaintiff further says that when the debts of the said firm are all settled and all the money collected that is collectable, there will be no assets whatever due the said firm to divide between this plaintiff and the said defendant, so that the said defendant now holds the said negotiable notes of this plaintiff without any consideration therefor to support them.

VII. Plaintiff further says that the said defendant is insolvent and now declares his intention to negotiate to innocent third parties the said negotiable notes, and so thereby embarrass the said plaintiff in the assertion of his equities against the said notes, if such transfer shall not entirely defeat and destroy plaintiff's right to interpose any equities of defense to the said notes in any suit thereon in an action at law.

VIII. This plaintiff therefore prays that an injunction may be awarded him against the said defendant restraining and inhibiting him from transferring and disposing of such negotiable notes in any manner whatsoever; that the same may be

canceled, set aside and held for naught; and grant unto plaintiff such other, further and general relief as to equity may seem meet, and as in duty bound he will ever pray, etc.

G——— M———, A——— B———,
Solicitor for Plaintiff. By Counsel.[28]

[28] As to when and under what circumstances an instrument will be canceled on the ground of drunkenness, see Hogg, Eq. Pr., § 59. See also in this connection, Loftus v. Maloney, 89 Va. 576, 16 S. E. 749.

"That greatest of Virginia law commentators concisely states: 'The plea of drunkenness was formerly regarded with as little favor in civil as it still is in criminal cases. For although Lord Coke classes a drunkard as *non compos mentis*, yet he allows him no indulgence on that account. "As for a drunkard," says he, "who is *voluntarius daemon*, he hath [as has been said] no privilege thereby, but what hurt or ill he doth, his drunkenness doth aggravate it." But for more than a century this rigorous doctrine has been much relaxed, and it is agreed that drunkenness invalidates, or renders voidable all contracts and transactions where: (1) the drunkenness was brought about by the opposite party; (2) a fraudulent advantage was taken of it; (3) it deprived the party of his reason, and of an agreeing mind. * * * The mere fact that one is drunk when he enters into a contract is no ground for setting it aside, at least in equity, unless under one or the other of the circumstances above stated; but when a person's habitual addiction to intoxication renders him extremely subject to imposition, such habits, though not carried to an excess constituting absolute incapacity, lay a ground for strict examination whether any instrument executed by him does not, in itself, or in the attendant circumstances, contain evidence that advantage was taken of those habits.' 2 Minor, Institutes (4th Ed.), 644. In the same connection, this author further says that when the drunkenness is brought about by the party obtaining the contract, the act is so flagrant a badge of fraud that it always renders the contract voidable, both at law and in equity; and that where a fraudulent advantage is taken of the drunkenness, this, too, is so direct a fraud as always to render the transaction voidable in all courts.

"The principle that is particularly applicable to the case under consideration is that equity will relieve one from a contract made by him in drunkenness, though his reason may not have been wholly overthrown, where fraudulent advantage has been taken, or where the drunkenness has been brought about by the other party. It is recognized clearly in 17 Amer. and Eng. Enc. of Law 402; 14 Cye. 1105; 1 Story, Eq. Jur., 231; 2 Pomeroy, Eq. Jur., § 949, and 2 Page on Contracts, § 905. Some of the many cases in point are: *Cooke* v. *Clayworth*, 18 Ves. 12; *Reynolds* v. *Waller*, 1 Wash. 164; *Wigglesworth* v. *Steers*, 1 H. & M. 70; *Samuel* v. *Marshal*, 3 Leigh 567; *White* v. *Cox*, 3 Hayw. 79; *Hotchkiss* v. *Fortson*, 7 Yerg.

No. 88*a*.

§ 942. To carry decree into execution.

[*After the title and address.*]

Complaining, shows unto Your Honor your orator, A. B., of etc., that your orator, on or about ———, filed his bill of complaint in this honorable court against C. D., stating [*set out substance of a bill for partition*], and praying [*set out prayer verbatim*].

And your orator further shows that, process of subpoena being served upon the said defendant, he appeared to the said bill and put in his answer thereto, to which a replication was filed. And the said cause being at issue, the same came on to be heard before Your Honor on or about ———, when a decree was made by Your Honor directing that a commission should issue to certain commissioners to be therein named, to make partition of the estate in question, and that the said estate was to be divided and separated, one-third part thereof set out in severalty, and declared to belong to the said C. D. and his heirs, and the remaining two-thirds part thereof declared to belong absolutely to your orator, to be held in severalty, by him; and the respective parties were decreed to convey their several shares to each other, to hold in severalty, according to their respective undivided shares thereof, and that it should be referred to P. G., one of the masters of this court, residing in the county of ———, to settle the conveyances, in case the parties differed about the same, as by the said proceedings and decree now remaining as of record in this honorable court, reference being thereunto had, will more fully appear.

And your orator further shows unto Your Honor that the commission awarded by the said decree never issued, on account of the said C. D. going abroad, and being, until lately, out of

67; *Crane* v. *Conklin*, 1 N. J. Eq. 346; *Thackrah* v. *Haas*, 119 U. S. 499; *Jones* v. *McGruder*, 87 Va. 360; *Weldon* v. *Colquitt*, 62 Ga. 449." Robinson, J., in Miller v. Sterringer, 66 W. Va. 169, 173, 174, 66 S. E. 228, 25 L. R. A. (N.S.) 596.

the jurisdiction of this honorable court; but the said C. D. having now returned, and the inconvenience mentioned in your orator's former bill still existing, your orator is desirous of having the said decree forthwith carried into execution, but from the great length of time which has elapsed, and the refusal of the said C. D. to concur therein, your orator is advised the same can not be done without the assistance of this honorable court.

Your orator therefore prays that the said C. D. may be made defendant to this bill; and that the said decree may be forthwith carried specifically into execution and the said C. D. ordered to do and concur in all necessary acts for that purpose; and grant unto your orator such other, further and general relief as to Your Honor may seem meet, as in duty bound he will ever pray, etc.

A. B.,
By Counsel.

J. W. C.,
Solicitor for Complainant.[29]

No. 89.

§ 943. For contribution among co-surities.

[*After the usual caption, address and commencement.*]

I. On the ——— day of ———, 19—, a judgment was rendered in the circuit court of ——— county, in the state of ———, in favor of F. R., against A. B., this plaintiff, and the defendants, C. D. and E. F., for the sum of $———.

II. Plaintiff further complains and says that execution against the property of the said A. B., C. D. and E. F. was issued upon the said judgment directed to the sheriff of the county of ———, and was by him levied upon certain goods and chattels found in said county which belonged solely to this plaintiff and no part of which belonged to the defendant, C. D., or the defendant, E. F.

III. Plaintiff, further complaining, says that said goods and chattels were sold on the ——— day of ———, 19—, by said

[29] The form here given will be found in Fletcher on Equity Pl. & Pr., 1018, and is taken by the author from Willis, Pl. in Eq., 391.

sheriff and the proceeds thereof, which amounted to $———, were applied to the payment and discharge of the said judgment, its interest, and the costs of the action.

IV. The plaintiff further says that the said C. D., at the time when said judgment was rendered, was and now is insolvent and was unable, therefore, to pay any part of said judgment.

V. Plaintiff says that he was and is liable only for the payment of half of said judgment, interest and costs, and that the said E. T. was and is liable to pay the other half thereof; and inasmuch as this plaintiff was required to pay all of said judgment, interest and costs, the said defendant, E. F., is liable to make contribution to this plaintiff for his half of said judgment, which now amounts, with its accrued interest, to the sum of $———, and likewise for his half of said costs, which amounts to the sum of $———.

Plaintiff therefore prays that the said E. F. may be required to contribute to the payment of his part of said judgment by paying to said plaintiff the sum of $———, with interest thereon until the same shall have been paid, and that the plaintiff may have a decree for the payment thereof against the said E. F., and grant unto this plaintiff such other, further and general relief as to equity may seem meet, and as in duty bound he will ever pray, etc.

A——— B———,
By Counsel.[30]

J——— G——— D———,
Solicitor for the Plaintiff.

[30] In order to maintain a bill for contribution, it must appear that the plaintiff used due diligence, without effect, to obtain reimbursement from the principal debtor, or that the debtor is insolvent. Hood v. Morgan, 47 W. Va. 817, 35 S. E. 911.

"The principle of contribution applies when one of several parties, who are liable for the payment of a common debt or obligation, discharges the same for the benefit of all. It is not founded on contract, but upon the general principles of justice and equity; and upon the further principle that where the interest is common or mutual the burden shall likewise be so. And though courts of law now assume jurisdiction to enforce contribution in some cases, this in nowise affects the jurisdiction originally belonging exclusively to equity.

No. 90.

§ 944. For the dissolution of a corporation in a court of equity.

The bill of complaint of A——— B———, C——— D——— and E——— F———, against The Aetna Salt Company, a corporation. G——— H———. I——— J———, K——— L———, M——— N——— and O——— P———, filed in the circuit court of Mason County, West Virginia.

The plaintiff complain and says that:

I. The said The Aetna Salt Company is a corporation which was created and organized in April, 1889, under the laws of the state of West Virginia, for the purpose of manufacturing and selling salt and doing a general merchandise business in connection therewith, as will more fully and at large appear from its charter, a copy of which is herewith filed marked "Exhibit A," and made part of this bill.

II. The capital stock of said corporation is forty thousand dollars, all of which has been paid up, and the present stockholders of the said company are these plaintiffs and the defendants, G——— H———, I——— J———, K——— L———, M——— N——— and O——— P———.

III. Of the said capital stock of forty thousand dollars, the said plaintiffs hold and own more than one-fifth [*or* not less than one-fifth]. That is, the said A——— B——— holds and owns five thousand dollars thereof; the said C——— D——— holds and owns eight thousand dollars thereof; the said E——— F——— holds and owns two thousand dollars thereof; and the residue of the said capital stock is held and owned by all the defendants other than the said corporation.

"The usual instances wherein contributions may be enforced are among cosureties, partners, tenants in common creditors, owners of vessels, wrongdoers, joint obligors and devisees and legatees." Hogg, Eq. Pr., § 63.

Where the judgment is rendered jointly against one or more sureties, one may have contribution from another as to costs; but it is otherwise if the judgment be against only the surety seeking contribution. 13 C. J. 827, and cases cited.

IV. The said corporation began the manufacture and sale of salt on the ——— day of ———, 18—, and has continued to do so until within the last twelve months, when it ceased to operate its salt works entirely and has been idle ever since that day.

V. For the last four years of the time immediately preceding the day upon which the said corporation ceased to manufacture and sell salt, the business was conducted at a considerable loss each year, and to compensate for the loss thus incurred by said corporation, an assessment was made at the end of each year to meet and liquidate such indebtedness. The amount of these assessments varied with each year, but during the four years immediately preceding the day upon which said corporation ceased to conduct its operations of business, the aggregate assessments thus paid in by all the stockholders was eleven thousand eight hundred dollars.

VI. The business for which said corporation was created is no longer profitable, and it can not be carried on so as to make it self-sustaining, and for that reason the stockholders ceased in their management of said corporation to operate its works or to permit any business to be carried on by it.

VII. The property of said corporation is of such a nature that it very greatly deteriorates in value when not in use, and it would be greatly to the interests of the stockholders thereof if the said corporation should be dissolved and its property sold under decree of this court; and plaintiffs aver that it is their desire that this be done, and that all the other stockholders have the same desire, with the exception of said M. N. and O. P., who, for some reason unknown to these plaintiffs, decline to enter into voluntary dissolution of the said corporation, so that it is obligatory upon these plaintiffs to go into a court of equity and ask this relief by a decree of dissolution.

VIII. These plaintiffs therefore pray that they may have a decree dissolving the said corporation, and for the sale and distribution of its assets, and that they may have such other,

further and general relief as the court may see fit to grant, and as in duty bound they will ever pray, etc.

A——— B———,
C——— D———,
and E——— F———,
By Counsel.[31]

H——— & H———,
Solicitors for the Plaintiff.

No. 91.

§ 945. In a creditor's suit against the estate of a decedent.

[*Title as shown in form No. 1.*]

I. Humbly complaining, sheweth unto Your Honor, your orator, A——— B———, that he brings this suit on behalf of himself and all other creditors of the estate of C——— D———, deceased.

II. Your orator would further show that on the 6th day of January, 1902, the said C——— D——— died intestate, and that E——— F——— was, on the 24th day of April, in said year, duly appointed administrator of his estate, gave bond and qualified as such, and ever since hath been and is now acting as such administrator.

III. Your orator further sheweth unto Your Honor that on the ——— day of ———, 19—, and in the lifetime of the said C——— D———, your orator obtained a judgment against the said C——— D——— in the circuit court of ——— county, in the state of ———, for eighteen hundred dollars, with interest thereon until paid, and the costs of suit, which amounts to ——— dollars, as will more fully and at large appear by reference to said judg-

[31] The above form is drawn from the principles laid down in Weigand v. Alliance Supply Co., 44 W. Va. 133, 28 S. E. 803; Andrews v. Roanoke Building Association & Investment Co., 98 Va. 445, 36 S. E. 531. See W. Va. Code, c. 53, § 57, as amended by Acts of 1915, c. 38.

For a form of a creditor's bill to dissolve a corporation, based on Rainey v. Freeport C. & C. Co., 58 W. Va. 424, 52 S. E. 528, see 3 Whitehouse, Eq. Prac., 2312.

ment itself and a taxation of said costs, certified copies of which are herewith filed as exhibits numbered 1 and 2 respectively, and made part of this bill. Your orator further sheweth that no part of said judgment was paid during the lifetime of the said C——— D———, that your orator had said judgment revived in the name of the said E——— F——— as personal representative of the said C——— D———, and that execution was issued thereon and returned without any property being found with which to pay the said judgment, as will more fully and at large appear by reference to said execution and return thereon endorsed, copies of which are herewith filed as exhibits numbered respectively 3 and 4, and made part of this bill.

IV. Your orator further represents unto Your Honor that he is informed and believes and so represents that the estate of the said C——— D——— is largely indebted, and that there is no personal property belonging to said estate out of which to pay the said debts.

V. Your orator further represents unto Your Honor that the said C——— D——— died seized and possessed of certain real estate situate in the county of ———, in the state of ———, on the waters of Pocatalico river, in the district of ———, containing about eight hundred acres, as appears from the title deeds therefor of record in the office of the clerk of the county court of said county, in Deed Books Nos. 5, 7 and 9, and pages ———, ——— and ———, respectively, certified copies of which are filed herewith, as a part hereof, numbered as exhibits 5, 6 and 7, respectively.

VI. Your orator further sheweth unto Your Honor that said C——— D——— left him surviving the defendants, M——— D——— as his widow, and P——— D———, F——— D——— and J——— D——— as his only children and heirs-at-law, the latter two of whom are infants under twenty-one years of age.

VII. Your orator therefore prays that the said E——— F———, administrator of the estate of the said C——— D———, deceased, the said M——— D——— as his widow,

and the said F——— D———, P——— D——— and J——— D——— as his only children and sole heirs-at-law, be made parties defendant to this suit; that a suitable person be appointed guardian *ad litem* for the infant defendants; that the administration accounts of the said E——— F——— may be stated; that an account of all debts and liabilities of the estate of the said C——— D——— may be taken and their priorities ascertained and determined; that the amount and value of the real estate owned by the said C——— D——— at the time of his decease may be also ascertained and determined; that all other accounts and orders which are proper may be taken and made in this cause; and grant unto your orator such other, further and general relief as to equity and good conscience may seem meet, and as in duty bound he will ever pray, etc.

A——— B———,
By Counsel.[32]

J——— B——— M———,
W——— R——— G———,
Solicitors for the Plaintiff.

[32] The form given above is founded upon the directions for the draft of such a bill found in Sands, Suit in Equity (2d Ed.), 103, 104; Ryan v. McLeod, 32 Gratt. (Va.) 367; McCandlish v. Keen, 13 Gratt. (Va.) 615. See W. Va. Code, 1913, c. 86, § 7.

It will be observed that the form above set forth contemplates a suit by a creditor brought on behalf of himself and all other creditors of the decedent's estate.

This is the proper method of bringing a suit of this character; but it is not essential that the suit should be such in its inception as shown by the authorities.

"A bill filed by a single creditor of a decedent's estate, or a single judgment-lien creditor of a living debtor, if in other respects proper, may by an order of reference to a commissioner and convention of other creditors entitled to be provided for in the suit, be converted into a creditors' suit, and it will be regarded as such from the time such order of reference is made." Arnold v. Casner, 22 W. Va. 444.

From a note to Suckley v. Rotchford, 16 Va. Rep. Ann. 495, we take the following:

"And although the bill is not in form a general creditors' bill, yet if the case stated and the relief contemplated and prayed are such as are contained in a general creditors' bill, it will be considered and treated as such. Thus, where a creditor files a bill against a company, alleging its insolvency, asking that the creditors be convened, that the amount of debts and assets be taken, and that a receiver be appointed, it is a creditors' bill in

No. 92.

§ 946. For the rescission of a contract of a corporation because the act is ultra vires.

[*After the proper caption and commencement.*]

1. That he is a citizen and resident of the state of Indiana, and brings this suit on behalf of himself and all other stock-

substance and legal effect as if it had been framed as such in the technical form, although the bill is not in so many words professed to be on behalf of himself and of other creditors. Piedmont & A. Life Ins. Co. v. Maury, 75 Va. 508. In Williams v. Newman, 93 Va. 724, 26 S. E. 19, the court says: 'It is well settled that a suit in chancery, brought by one creditor against the estate of a decedent, although filed on behalf of himself only, may, by decree convening all the creditors and directing a statement of proper accounts, be converted into a general creditors' bill, and from the date of such a decree it will be considered and will carry with it all the incidents and consequences attending the filing of a technical creditors' bill.' Beverly v. Rhodes, 86 Va. 418, 10 S. E. 572; Rice v. Hartman, 84 Va. 252, 4 S. E. 621; Hurn v. Keller, 79 Va. 418; Paxton v. Rich, 85 Va. 378, 7 S. E. 531; Carter v. Hampton, 77 Va. 637; Ewing v. Ferguson, 33 Gratt. 548; Gordon v. R. F. & P. R. Co., 81 Va. 621. And though a creditor files a bill to subject personal and real estate of a deceased debtor to the payment of his debt saying nothing of other creditors, yet if he prays that the administration account may be settled, that an account of all debts and liabilities of the estate may be taken and their priorities be fixed, that the amount and value of real estate may be escertained, and that all other accounts and orders which are proper may be taken and made, this is a creditors' bill. And under such a prayer a decree for a general account may be made; or all the creditors may be permitted to come in and prove their debts, or an order staying other suits may be made, and all the assets be administered in the one suit. Duerson v. Alsop, 27 Gratt. 229. Thus, where a bill is filed by a single creditor against an administrator and the heirs of a decedent to subject the real estate descended to the heirs to the payment of his claims, although not in form a creditors' bill, it will become a creditors' suit from the time the court makes an order referring the cause to a commissioner to convene the creditors by publication, and report the debts of decedent. Laidley v. Kline, 23 W. Va. 565. And a suit of distributees to ascertain and pay the debts of an estate, and to distribute the surplus is substantially a creditors' bill. Norvell v. Little, 79 Va. 141."

A bill filed by a general creditor to subject the real estate of a decedent must be on behalf of the plaintiff and all other creditors, and it must appear that the personal property is insufficient to pay the debts. Crawford's Admr. v. Turner's Admr., 58 W. Va. 600, 52 S. E. 716, 112 Am. St. Rep. 1014.

holders[33] of the C——— & O——— Railway Company, a corporation.

2. Your orator further says that he now is, and since the ——— day of *June, 1892,* has been, the owner of one hundred shares of the capital stock of the said *C. & O. Railway Company,* the capital stock of said company being *$64,000,000,* divided into shares of *$100* each.

3. Your orator further says that the said *C. & O. Railway Company* is a corporation created by, and organized and operated under, the general laws of the states of *Virginia* and *West Virginia,* respectively, and was such prior to the time of the making of the contracts hereinafter complained of, and as such then was and ever since has been engaged in operating, as a common carrier of persons and freight, a railroad extending from *Newport News* in the state of *Virginia,* on or near the waters of the *Chesapeake Bay,* thence through said state to the city of *Richmond* in said state, thence further through said state to *Taylorsville* in said state, thence further through said state to the city of *Covington,* thence into and through the state of *West Virginia* to a point on the *Ohio River,* whence said railroad was extended and still extends by leased line or other means of control to the city of *Cincinnati* in the state of *Ohio.*

4. Your orator further says that the only powers possessed by the said *C. & O. Railway Company* at the time of the making of said contracts hereinafter complained of, and the only powers which it could lawfully exercise, were the powers incident to the right to own, control and operate said railroad, and that it had no powers whatever other than the powers

[33] A bill of the above form must be brought by the plaintiff on behalf of himself and all other stockholders similarly situated, to annul the contract complained of in the bill. The authorities applying here are clear, ample and decisive. Clark on Corporation, 393, 394; Rathbone v. Gas Co., 31 W. Va. 798, 8 S. E. 570; Dunphy v. Travelers' Newspaper Assn., 146 Mass. 495, 16 N. E. 426, 430, 431; Brewer v. Theatre, 104 Mass. 378; Allen v. Wilson, 28 Fed. 677; Detroit v. Dean, 106 U. S. 537, 1 S. Ct. 560, 27 L. Ed. 300; Dimpfell v. Railway Co., 110 U. S. 209, 3 S. Ct. 573, 28 L. Ed. 121.

granted for the purpose aforesaid and those necessarily incident thereto.[34]

5. Your orator further says that the said *C. & O. Railway Company* has not now, and had not at the time the contracts hereinafter mentioned were entered into, any power whatever to engage in the business of trafficking in coal or coke by means of buying and selling the same, or by means of guaranteeing the price thereof, and has now and had then no power whatever to deal in coal or coke as merchantable commodities by buying the same at the mines or ovens, for selling the same in the market, or guaranteeing the price therefor to the producer, and had no authority or power whatever so to employ or embark any of its funds, earnings or capital, or for the purpose of purchasing any coal or coke, or for the purpose of taking, acquiring or holding any coal except as needful from time to time for the construction and operation of said railroad and its business, and that said railroad company had not, at the time said contracts hereinafter mentioned were entered into, and has not now any power to guarantee to any person or persons a price for coal or coke to be sold in the markets by such persons.

6. But so it is, at some time during the years *1893* and *1894* (the exact time your orator is not able to learn) the said *C. & O. Railway Company* did enter into certain contracts with certain persons, coal companies and coal operators operating coal mines and coke ovens along its line of railroad in the state of

[34] A stockholder who applies to a court of equity for its summary interference to protect his stock against the consequences of an act not prohibited by law, but in excess of the power of the corporation, to be entitled to what he asks, must apply promptly. He can not wait to speculate upon the chances, but he must come before the act of which he complains has become the foundation of rights or equities which must be overthrown to extend relief to him. Rabe v. Dunlap, 51 N. J. Eq. 40, 25 Atl. 959; Burgess v. St. Louis R. Co., 99 Mo. 496, 12 S. W. 1050; Boyce v. Montauk Gas Coal Co., 37 W. Va. 73, 16 S. E. 501; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 30; Lucas v. Transfer Co., 70 Iowa 542, 30 N. W. 771, 59 Am. Rep. 449; Bissell v. Railroad Co., 22 N. Y. 259; Watt's Appeal, 78 Pa. St. 370.

West Virginia, whereby it did undertake and agree to purchase from them, and they did undertake and agree to sell and deliver to said railway company, for long terms of years, none of which terms have yet expired, and did guarantee to said persons a price for, great quantities of coal and coke, being as much as *775,000* tons per annum, as your orator charges and avers on information and belief, making in all, as he charges and avers on like information and belief, as much as *5,615,000* tons, and that said railway company is obligated by said contracts to pay therefor during the life of said contracts an enormous sum of money, the amount of which is unknown to your orator, but which your orator on information and belief charges would not be less than *four millions* of dollars, and that all of said coal and coke covered by said contracts was purchased or the price therefor guaranteed by said railway company for the sole purpose of being sold again by it, or for it, in the market, and none was purchased for, needed or used in the operation of said railroad or its business.

7. Your orator says that, among other contracts so entered into by said *C. & O. Railway Company,* there are one or more with the defendant, the *H. C. and C. Company,* then and ever since operating extensive coal mines and coke ovens on the line of said railroad in *West Virginia,* whereby the said railway company did undertake and agree, as your orator charges and avers on information and belief, to buy from said coal company, and said coal company did undertake to sell and deliver to said railway company during a term of years that have not yet expired, and will not expire for many years yet, all the coal and all the coke that could be produced by said coal company at its mines and coke ovens on the line of said railroad during said time and at an agreed price amounting, as your orator charges and believes, to many thousands of dollars each and every year of said period, which amount said railway company has bound itself to pay. Your orator says that he has and can obtain no more definite information as to the nature of said contract and as to the amount of coal and coke said rail-

way company has been and will be required to purchase and pay for than as above stated; but that the said coal company now is and for several years last past has been operating extensive mines and coke ovens, said ovens not numbering less than one hundred, and will so continue during the life of said contracts, the product whereof said railway company will be obliged to take and pay for at fixed prices in the future as it has done in the past, unless your orator obtain the relief herein sought.

8. Your orator says that the price fixed or agreed upon in said contract with the *H. C. and C. Company* exceeds the market value of said coal or coke or the value of said coal or coke to said railway company; that said railway company has suffered great loss thereby; that the market price and value of said coal and coke to said railway company is likely to continue in the future to be less than the price said railway company is obligated by said contract to pay therefor; and that said contracts are now and will continue to be a source of great pecuniary detriment to said railway company, to your orator as a stockholder thereof, and to all other stockholders of said railway company.

9. Your orator says that one of the contracts existing between the said *H. C. and C. Company* and said *C. & O. Railway Company* was entered into with another party, but afterward assigned to said *H. C. and C. Company*, and that said contracts were afterward, some time in the year *1895* or *1896*, modified so that said *H. C. and C. Company* might sell said coal to other parties acceptable to the said *C. & O. Railway Company*, said *C. & O. Railway Company*, however, guaranteeing to said *H. C. and C. Company* for said coal so sold payment at the prices named in said contracts prior to modifications, the quantity so sold to be deducted from the amount agreed to be taken under said contract.

10. Your orator says that the said *C. & O. Railway Company* had, and has now, no power whatever to make or carry out said contracts, or any of them, or the said modifications there-

of, and that all the same are illegal and void; that your orator did not until on or about the ——— day of *December, 1898*,[35] know of the existence of any of said contracts and of the practices thereunder, and that in the month of *January, 1899*, your orator demanded, at a regular meeting of the board of directors of the said *C. & O. Railway Company*, that they, in the name of the said company, declare such contracts void, that they refuse further to perform the same or to permit them to be performed, that they bring an action, if necessary, in the name of the company to have the same annulled, and that, if said board should fail to take such action, they call a special meeting of the stockholders of the said *C. & O. Railway Company*, to whom your orator could present his said grievances herein complained of; but that said board of directors of the said *C. & O. Railway Company* refused to take any action whatever, as requested, or to do anything whatsoever looking to a repudiation of said contracts.

11. Your orator further says that thereafter he obtained a special meeting of the stockholders of said *C. & O. Railway Company*, on the ——— day of *March, 1899*, which was held in the city of *Richmond*, in the state of *Virginia*, and that at said meeting your orator requested the said stockholders to remove the said board of directors and to elect another board of directors who would take steps to annul the said contract or would decline further to perform the same on the part of the said *C. & O. Railway Company*, but that the said stockholders declined and refused to do anything with reference to said matter whatever. All of which will more fully and at large appear by reference to the proceedings of the said board

[35] In order to relieve against an act or contract alleged to be *ultra vires*, by a stockholder of a corporation in a suit in equity brought for that purpose, it must appear that the plaintiff was a stockholder in the corporation at the time of the act complained of, or that the stock has devolved upon him since by operation of law. Boyce v. Montauk Gas Coal Co., 37 W. Va. 73, 16 S. E. 501, in the course of the opinion, citing Dimpfell v. Railway Co., 110 U. S. 209, 3 Sup. Ct. 573, 28 L. Ed. 121.

of directors and the said stockholders at their said last-named meeting, certified copies of which are herewith filed, marked as exhibits Nos. "1" and "2," respectively, and made part of this bill.

12. Your orator further says that said railway company will persist and continue to carry out said contracts and said obligations hereinbefore mentioned, in the future as it has done in the past, to the great and irreparable injury of said company and the stockholders thereof, including your orator, and that he does not possess and can not obtain the necessary information to fix the amount of coal and coke which the said *C. & O. Railway Company* is obligated under said contracts to take by purchase from the said *H. C. and C. Company,* nor the prices which said railway company is obligated under said contracts to pay for said coal and coke; that such facts are peculiarly and exclusively within the knowledge of the defendants; that discovery by the said *H. C. and C. Company,* through its officers, books and agents, is necessary; and that the defendant, *J. A. M.,* is the president of said *H. C. and C. Company.*

13. Your orator says that this is not a collusive suit to confer on a court of equity jurisdiction of a case of which it otherwise would not have cognizance, and that your orator was a stockholder of the said *C. & O. Railway Company* at the time of the transactions herein complained of.[36]

[36] Whatever under the charter of a corporation and the general laws applicable to it, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited. Green Bay & M. R. Co. v. Union Steamboat Co., 107 U. S. 100, 27 L. Ed. 413, 2 S. Ct. 221.

Where certain matters are embraced in a contract which are *ultra vires* as to the contracting corporation, these matters so included do not affect the validity of the contract as to those things contained in it which are *infra vires* as to such corporation. Bath Gas Light Co. v. Claffy, 151 N. Y. 24.

Whatever may fairly be considered as incidental to the purposes for which a corporation was created is not to be taken as prohibited, but is as much granted as that which is expressed. Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co., 131 U. S. 371, 9 S. Ct. 770, 33 L. Ed. 157; Green Bay & M. R. Co. v. Union S. B. Co., 107 U. S. 98, 2 S. Ct. 221, 27 L. Ed. 413; Ellerman v. Chicago Junction

In consideration whereof, and for as much as your orator is remediless in the premises at and by the strict rules of the common law, and the premises are only relievable in a court of equity, where matters of this kind are properly cognizable and relievable, your orator prays the aid of this honorable court, and that the defendant, *The C. & O. Railway Company,* may be enjoined from in any manner carrying out, recognizing or fulfilling any of the contracts hereinbefore mentioned between it and the said *H. C. and C. Company* for the purchase of coal

R. & Union Stock Yards Co., 49 N. J. Eq. 217, 23 Atl. 287.

If a contract is *ultra vires*, and a plaintiff has received the benefits of it, he will not be heard to question its validity. Kadish v. Garden City Equitable Loan & Bldg. Asso., 151 Ill. 531, 38 N. E. 237, 42 Am. St. Rep. 256; Fort Worth City Co. v. Smith Bridge Co., 151 U. S. 294, 14 S. Ct. 339, 38 L. Ed. 167; Bissell v. Michigan S. & N. I. R. Co., 22 N. Y. 258; Heims Brewing Co. v. Flannery, 137 Ill. 309, 27 N. E. 286; Daniels v. Tearney, 102 U. S. 415, 26 L. Ed. 187; Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659.

Likewise, the corporation will be estopped from defending against a contract on the ground of *ultra vires*, where it has received benefits under the contract and no public rights are violated. News-Register Co. v. Rockingham Publishing Co., 118 Va. 140, 86 S. E. 874.

If it is possible, under any hypothetical condition of facts, for the act in question to be within the express or implied power of a corporation, the corporation will be estopped in a particular instance to say that the act in question is not within such express or implied power, where such a defense would be to the injury of an innocent third party, and this, even if the act itself was unauthorized and illegal. Citizens' State Bank v. Hawkins, 34 U. S. App. 423, 71 Fed. 369, 18 C. C. A. 78; Farmers' Nat. Bank v. Sutton Mfg. Co., 6 U. S. App. 312, 52 Fed. 195, 3 C. C. A. 1, 17 L. R. A. 595; Marshall County Supers. v. Schneck, 5 Wall. (U. S.) 772, 784, 18 L. Ed. 556, 559; Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 267, 24 L. Ed. 693, 695; Macon County v. Shores, 97 U. S. 272, 279, 24 L. Ed. 889; Farmers' & M. Bank v. Butchers' & D. Bank, 16 N. Y. 125, 69 Am. Dec. 678; Stoney v. Am. L. Ins. Co., 11 Paige (N. Y.) 635; Madison & I. R. Co. v. Norwich Sav. Soc., 24 Ind. 457; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; State Bd. of Agri. v. Citizens' Street R. Co., 47 Ind. 407, 17 Am. Rep. 702; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 30.

See National Car Advertising Co. v. Louisville and Nashville R. Co., 110 Va. 413, 66 S. E. 88, 24 L. R. A. (N.S.) 1010.

and coke as aforesaid; that said contracts be canceled, set aside and held for naught as *ultra vires;* and to that end, your orator further prays that the said *H. C. and C. Company* may be made a defendant to this bill, and also the said J. A. M., who is the president of the *H. C. and C. Company*, fully acquainted with all the business of the said *H. C. and C. Company;* that the said *H. C. and C. Company* may, if it can, show why your orator should not have the relief prayed for; and that the said J. A. M. may be required upon his corporal oath and according to his best and utmost knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the following interrogatories: [*The interrogatories referred to are omitted as being unnecessary to be set out in this form.*] And your orator prays for such other and further relief as to equity may seem meet and as in duty bound he will ever pray, etc.

W——— G———,
H——— C——— G——— and H———, By Counsel.
Solicitors for the Plaintiff.

[*Add the necessary affidavit for verification.*]

No. 93.

§ 947. In a creditors' suit enforcing judgment lien.

The bill of complaint of A——— B———, who sues on behalf of himself and all other lien creditors of C——— D———, against C——— D———, E——— F———, G——— H———, I——— J———, and K——— L———, trustee, filed in the circuit court of *Monroe* County, *West Virginia.*

The plaintiff complains and says that on the ——— day of ———, 19—, he obtained a judgment against the said C——— D——— in the circuit court of *Monroe* County, and in the state aforesaid, for the sum of ——— dollars, with interest thereon from the date of said judgment until paid, and ——— dollars, costs of the suit in which said judgment was rendered. All which will more fully and at large appear from a certified copy of said judgment and the taxation of the costs of said

suit, herewith filed, marked as exhibits "A" and "B," respectively, and made part of this bill.

This plaintiff further says that, prior to the rendition of said judgment in favor of this plaintiff, said C——— D——— executed a deed of trust to the said K——— L———, trustee, to secure the payment of a certain debt, evidenced by a promissory note, payable to the said I——— J——— for two hundred dollars, as will more fully and at large appear by the said trust deed, duly of record in the office of the clerk of the county court of said county, in Deed of Trust Book No. ———, at page ———, an attested copy of which is herewith filed, marked "Exhibit C," and made part of this bill.

This plaintiff further says that the said defendants, E——— F——— and G——— H———, on the ——— day of ———, 19—, obtained a judgment against the said C——— D——— for the sum of one hundred and forty-two dollars, with interest thereon from the date of judgment until paid, and ——— dollars costs, as will more fully and at large appear by reference to a certified copy of said judgment, together with the taxation of costs, herewith filed, marked, respectively, as exhibits "D" and "E," and made part of this bill.

This plaintiff further says that on the ——— day of ———, 19—, he caused an execution to be issued upon the said judgment obtained by this plaintiff, which execution was placed in the hands of the sheriff of Monroe County, and subsequently returned by the said sheriff with the endorsement thereon made: "No property found out of which the within execution can be made. (Signed) S——— J——— C———, Sheriff of Monroe County," all of which will more fully and at large appear by a certified copy of said execution, together with the return thereon, herewith filed, marked "Exhibit F," and made part of this bill.

[*Or where no execution has issued within two years from date of judgment, in lieu of this paragraph aver that* no execution ever issued upon said judgment within two years next after the date of the rendition thereof.]

This plaintiff further says that at the time of the rendition of said judgment the said C——— D——— was the owner in fee of two tracts of land, situate in the district of ———, in the said county, and sold and conveyed to him, the said C——— D———, by J——— R——— and M——— P———, respectively, by deeds bearing the respective dates of August 5, 1876, and October 27, 1882, which will more fully and at large appear from said deeds themselves, which are duly of record in the office of the clerk of the county court of said county, in Deed Books Nos. ——— and ———, at pages ——— and ———, respectively, attested copies of which are herewith filed, marked, respectively, as exhibits "G" and "H," and made part of this bill.

The plaintiff is informed and believes, and so states the fact to be, that the first of the foregoing tracts of land contains about one hundred acres, that the latter thereof consists of about seventy-two acres, and that this is the only real estate, the plaintiff is informed and believes and so avers, of which the defendant is the owner, or in which he has any interest.

The plaintiff says that he brings this suit on behalf of himself and all other lien creditors of the said C——— D———, that the various liens against the said real estate may be properly adjudicated and their priorities determined and enforced against the said real estate.

This plaintiff avers that his said judgment remains wholly unpaid, and is a binding and subsisting lien upon all the said real estate; that he is advised, and so avers, that the said other judgment lien, as well as the said trust lien, are also unpaid and constitute liens upon the said real estate; and that if there are any other liens thereon this plaintiff is unable to say by whom they are held, but plaintiff believes and so states that no other liens exist against the said real estate.

This plaintiff also avers that the rents, issues and profits of the said real estate will not, in five years, pay off and discharge the liens existing thereon.

This plaintiff now prays that this cause may be referred to a commissioner in chancery to take and report the liens and their priorities upon said real estate; that there may be a decree of sale, upon the return and confirmation of said report, of the said real estate, or so much thereof as may be necessary, to pay off and discharge the various liens thereon, and grant unto this plaintiff such other, further and general relief as the court may see fit to grant, and as in duty bound he will ever pray, etc.

S——— & S———, Solicitors for the Plaintiff.

A——— B———, By Counsel.[38]

[38] It will be observed that the form as given above sets out the issuing of an execution upon the judgment of the plaintiff and the return thereon of "No property found out of which the within execution can be made."

This allegation is necessary in a suit of this kind in *West Virginia*, but it may be omitted in a suit of the same character in *Virginia*. *Ante*, § 123, note.

It will be observed that the form alleges that the rents and profits of the land of the judgment debtor will not satisfy the liens thereon within five years. If it be true that the rents and profits of the debtor's land in such case will not pay off and discharge the liens on his real estate, it is advisable so to allege the fact so that if such fact be admitted by the pleading the expense and delay of taking proof to establish this point will thus be avoided.

The draft of this bill is founded upon the principles announced in 2 Barton, Ch. Pl. & Pr. (2nd Ed.), 1285; *ante*, §§ 61, 123; Newlon v. Wade, 43 W. Va. 283, 27 S. E. 244. See Westinghouse Lamp Co. v. Ingram, 79 W. Va. 220, 90 S. E. 837.

But "the general rule requiring that a judgment debtor's lands be rented, if the same will rent for sufficient in five years to pay his debts, is inapplicable to coal in place owned by him, and having no rental value." Morris v. Baird, 72 W. Va. 1, 78 S. E. 371, Ann. Cas. 1915A, 1273.

If no execution has issued upon the judgment within two years after the date of its rendition, then it is not necessary to aver the issuance of an execution on the judgment and a return of "No property found." Dunfee v. Childs, 45 W. Va. 155, 30 S. E. 102. But the issuance of an execution in order to enforce a judgment lien is not required in any case as to judgments rendered before the act of March 13, 1891, was passed. Dunfee v. Childs, *supra*.

For form of creditors' bill to enforce a judgment lien, based on Golden v. O'Connell, 69 W. Va. 374, 71 S. E. 384, see 3 Whitehouse, Eq. Prac., 2347.

No. 94.

§ 948. In a creditors' suit by an executor or administrator to subject the real estate of the decedent to the payment of his debts.

[*After the usual caption, address and commencement.*]

I. On the ——— day of ———, 19—, the said C——— D——— died intestate, and your orator was on the ——— day of ———, 19—, duly appointed administrator of his estate, gave bond and qualified, and ever since hath been and is now acting as such administrator.

II. Your orator further says that the said C——— D——— at the time of his death owed a large number of debts, some of which were evidenced by judgments, and others by notes and open accounts, and that said judgments, notes and open accounts remain entirely unpaid, and the personal estate of said decedent is insufficient to pay the same.

III. Your orator further says that there came into the hands of your orator personal property to be administered, which was duly appraised, of the value of four hundred dollars, as will more fully and at large appear by this plaintiff's inventory thereof, and its appraisement, copies of which are herewith filed marked, respectively, as exhibits "1" and "2," and made part of this bill.

IV. Your orator further says that the said deceedent left very considerable real estate, a part of which is situated in the county of ———, and the residue thereof in the county of ———, in the said state, as will more fully and at large appear from the said deceedent's title deeds therefor, duly recorded in the said county of ———, in Deed Books Nos. ——— and ———, at pages ——— and ———, respectively, and in the said county of ———, in Deed Books Nos. ——— and ———, at pages ——— and ———, respectively, attested copies of which are herewith filed marked, respectively, as exhibits "3," "4," "5" and "6," and made part of this bill.

V. Your orator further says that the said decedent left the said R——— D———, as his widow, and the said F———

and S——— D——— as his only children and heirs-at-law, who as such are made defendants to this bill.

VI. Your orator further says that the said J——— R———, H——— S———, L——— M——— and S——— T——— are the only known creditors of the said decedent and as such are made parties defendant to this suit.

Your orator prays that his accounts as such administrator may be settled before a commissioner in chancery of this court; that an account of all debts and liabilities of said C——— D——— may be taken and their priorities ascertained and determined; that the amount and value of the real estate may be ascertained; that the personal estate, so far as it will do so, may be applied to the payment of the debts and liabilities of the said decedent; that all other accounts and orders which are proper may be taken and made in this cause, and grant unto your orator such other further and general relief as to equity may seem meet, and as in duty bound your orator will ever pray, etc.

A——— B———,
By Counsel.[39]

J——— F——— S———,
Solicitor for the Plaintiff.

[39] The draft of this bill is predicated on §§ 61 and 123 of this work, as to proper parties to and necessary allegation in such a bill.

In a case where presumption of death arises from absence for seven years, under the circumstances prescribed by W. Va. Code, 1918, c. 86, § 12, by virtue of Acts 1917, c. 27, the following section provides for the bringing of a suit to settle the estate of the supposed decedent, by the administrator, in the following language:

"The administrator of the estate of such supposed decedent may thereupon bring a suit in equity in the circuit court of the county in which the estate of such supposed decedent is, to which the widow, heirs, distributees and all known creditors of the supposed decedent shall be made defendants, and in which attested copies of the orders and notices relating to the appointment and qualification of such administrator shall be filed. The administrator shall also cause notice to the supposed decedent to be issued by the clerk of the circuit court, and published once a week for four successive weeks in a newspaper of general circulation in the county, and for the same period in a newspaper of general circulation in the county of the last known domicile of the supposed decedent in this state, requiring him to appear on a certain day of a regular or special term of said court, not less than three nor more than six months from the date of the first

No. 95.

§ 949. To have an instrument in the form of a deed declared to be a mortgage.

[*After the usual caption and address.*]

Your orator, A——— B———, respectfully represents unto Your Honor that on the ——— day of ———, 19—, your orator being indebted unto one C——— D———, the defendant hereinafter named, in the sum of ——— dollars, to secure the same with interest thereon at the rate of ——— per cent. per annum, to be paid on the ——— day of ———, 19—, by an absolute deed of conveyance of that date, conveyed to the said C——— D———, in fee simple, that certain tract of land lying in the district of ———, in the county of ———, and state of ———, more fully described in said deed of conveyance, a copy of which is duly of record in the office of the clerk of the county court of said county, in Deed Book No. ———, at page ———, an attested copy of which is herewith filed, marked "Exhibit No. 1," and made part of this bill.

Your orator further represents that the said deed of conveyance, although appearing to be absolute on its face, was not intended to be such by your orator and the said C——— D———, but on the contrary thereof, it was expressly understood and agreed between them that the same, and the said premises thereby conveyed, were to be held by the said C——— D——— simply and solely as a security for the payment of the said sum of money and interest as aforesaid; and that upon the payment of that sum and interest to the said C——— D———, the said C——— D——— would reconvey the said premises to your orator by an absolute deed.

publication thereof." W. Va. Code, 1918, c. 86, § 13; Acts 1917, c. 27.

The preceding form may readily be adapted to the situation covered by the statute above by merely substituting an allegation of absence of the supposed decedent, pursuing the language of the statute (Code, c. 86, § 12), for the allegation of death, with a further allegation that the administrator was duly appointed in pursuance of the statute, supporting the latter allegation with exhibits in the form of attested copies of the orders and notice relating to the appointment, as required by section 13.

Your orator further represents that he, your orator, has remained in the possession of said premises ever since the execution of said deed, and is now in the possession thereof.

Your orator further represents that he has paid all the interest due on the said sum of ——— dollars, to the said C——— D———, from the date of the said deed until, etc., when the said C——— D——— refused to receive further interest thereon from your orator; that your orator has always been, and still is, ready to pay the said C——— D——— what is due to him for principal and interest on the said sum of money; and your orator well hoped that the said C——— D——— would have received the same, and that he would reconvey to your orator the said premises, as in justice and equity he ought to have done.

But now so it is, may it please Your Honor, he, the said C——— D———, in order to deprive and defeat your orator of the benefit of redeeming the said premises, does pretend and give out that your orator did not execute the said deed of conveyance to the said C——— D——— as a security for the repayment of the said sum of money, with interest as aforesaid, but does pretend that the said sum of ——— dollars was paid to your orator in consideration of the absolute purchase of the said premises; and that the said deed was not intended between the parties thereto to be a mere security for the said sum of money, and interest as aforesaid; whereas, your orator charges the contrary of such pretenses to be the truth; and, upon the pretenses aforesaid, the said C——— D——— refuses to come to any manner of account with your orator, or to reconvey the said premises to him, although your orator has frequently, and in a friendly manner, applied to him for that purpose, and offered to pay him whatever, if anything, should be found to be due to the said C——— D——— upon an account being taken, with reference to the said transaction. All of which actings, doings and pretenses of the said C——— D——— are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator.

Your orator therefore prays that the said C——— D———, who is hereby made a party to this bill, may be required to make full and direct answer to the same; that an account be taken as to the state of the accounts between your orator and the said defendant; that if anything be found due the said defendant upon said accounting your orator may be permitted, as he now offers, to pay the same; that the defendant may be compelled to reconvey the said premises to your orator by sufficient and proper deed of conveyance in fee; and that your orator may have such other further and general relief as equity may require, and to Your Honor shall seem meet, and as in duty bound he shall ever pray, etc.

A——— B———,
By Counsel.[40]

J——— S——— S———,
Solicitor for the Plaintiff.

No. 96.

§ 950. Of discovery merely.

To the Honorable ———, Judge of the Circuit Court of ——— County, West Virginia:

The bill of complaint of H. M. R., as administrator of the estate of G. S., deceased, against O. D., filed in the circuit court of ——— county, West Virginia.

Your orator complains and says that on the ——— day of ———, 19—, said O. D. brought against the Exchange Bank of ———, in the circuit court of ——— county, her action of detinue to recover the sum of ——— dollars of silver coin of the United States, contained in *fourteen* linen bags, which had been left with said *Exchange Bank of* ——— for safekeeping on the ——— day of ———, 19—, by one W. D., who afterward stated said coin to be the property of the said O. D.

[40] See the author's Eq. Princip., §§ 337-347, where the subject of mistake is treated.

Your orator further says that your orator was, on the ——— day of ———, 19—, by the county court of ——— county, duly appointed administrator of the estate of G. S. of said county, deceased, who died intestate on the ——— day of ———, 19—, and that your orator duly qualified and gave bond as such administrator on the ——— day of ———, 19—.

Your orator further says that your orator claims that said bags of coin were the property of his said intestate, and that as such administrator your orator is entitled to receive them.

Your orator further shows that the said *Exchange Bank of* ——— appeared to the said action of detinue and filed an affidavit of its cashier, stating that it had the said bags of coin in its possession and keeping; that it made no claim to them, that the same were left with it by the said W. D. on the ——— day of ———, 19—, for safekeeping, that said W. D. subsequently stated them to be the property of said O. D., and that the property was claimed by your orator as administrator of G. S., deceased; that the said *Exchange Bank of* ——— did not collude with your orator as such administrator, but was ready to deliver the said property to the owner thereof, as the court might direct; and on motion of the said *Exchange Bank of* ——— your orator was made a defendant in the said action of detinue and was required to state the nature of his claim to the said coin and to maintain or relinquish the same.

And your orator avers that as such administrator he appeared as required, claimed the coin as the property of his intestate and denied that the said O. D. had any title thereto; that thereupon the court, on motion of said O. D., directed an issue to be tried to ascertain whether the said coin or any part thereof was, at the time when said action of detinue was instituted, the property of the said administrator, under which issue your orator was made plaintiff and said O. D. defendant; and that said issue is still pending and undetermined.

Your orator further shows, upon information and belief, that for many years before and until the time of his death, the said

G. S., deceased, resided in a house belonging to him in the said city of ———, a portion of which was used by him as a drug store and the remainder of which was used and occupied by him as a dwelling; that for years before his death, the said G. S. had been in the habit of accumulating and hoarding coin; that some time before his death, the said G. S. concealed beneath the earth in a secret portion of the cellar of his said house the silver money which is in controversy in the said action, and which at the time it was so concealed was the money and property of the said G. S. and of him alone; that the said last-mentioned silver money remained in the said house until after the death of the said G. S., and that it remained concealed under the earth in the said cellar as aforesaid, either until after the death of the said G. S., deceased, or until the day before his death.

Your orator further shows, likewise, on information and belief, that on the said ——— day of ———, A. D. 19—, the said G. S., deceased, met with a sudden, violent and unexpected death, and that until the last-named day the said G. S. was in his usual health and in no fear or expectation of, and having no reasonable or probable cause to fear or expect, immediate or proximate death.

Your orator further shows, upon information and belief, that the said O. D. claims to be the owner of the said silver money now in controversy in said action.

Your orator further shows that, in the view of the facts of which he has information and belief, he is advised and says that the said last-mentioned silver money was the property of the said G. S. at the time of his decease, and now is the property of your orator.

Your orator is advised and says that it is material for him, in order that he may properly maintain his side of the issue in said action, that he should have the discovery hereinafter prayed with reference to certain of the matters in this bill set forth.

In tender consideration whereof, and forasmuch as your orator is remediless in the premises save by the aid of a court of equity, your orator prays that the said O. D. may be made defendant to this bill and may be required to make full, true, direct and perfect answers to every of the following interrogatories ———, that is to say:

1st. Whether for many years before and until his death, the said G. S., deceased, resided in the said city of ———, in a house belonging to him, a portion of which was used and occupied by him as a dwelling?

2nd. Whether for years before his death, the said G. S. had been in the habit of accumulating and hoarding money?

3rd. Whether some time before his death the said G. S. concealed beneath the earth, in a secret part of the cellar of his said house, the silver money which is in controversy in the said action?

4th. Whether, at the time it was so concealed as aforesaid, the said last-mentioned money was the money and property of the said G. S., now deceased, and of him alone?

5th. Whether the said last-mentioned silver money remained in the said house until after the death of the said G. S.?

6th. Whether the last-mentioned money remained concealed under the earth in the said cellar as aforesaid, either until after the death of the said G. S., deceased, or until the day before his death?

7th. Whether on the ——— day of ———, A. D. 19—, the said G. S. met with a sudden, violent and unexpected death?

8th. Whether until the day last named, the said G. S. was in his usual health and had no fear or expectation of, nor reasonable or probable cause to fear or expect, immediate or proximate death?

Your orator also prays that a temporary injunction, until the further order of your Honorable Court, to be made upon full, true and perfect answers being filed to this bill, may be granted, restraining the said O. D., her attorneys, agents and servants, from further prosecuting the said action at law

brought by her as aforesaid against the *Exchange Bank of* ———, in which your orator has been made a party as aforesaid.

H——— M——— R———,
Adm'r of G. S., Deceased,
By Counsel.[41]

D——— L———.
Solicitor for the Plaintiff.

[*Here append the proper verification as shown in form No. 259 or 262.*]

No. 97.

§ 951. Of discovery in aid of defense at law.

To the Honorable A. B., Judge of the ——— Court of the County of ———, State of ———:

Complaining show unto the court your orators, C. D. and L. M., that one E. F. has instituted in the circuit court of the county of ——— his certain action of *assumpsit* against your orators, in which action the said E. F. seeks to recover of your orators the price of a certain horse alleged to have been sold by the said E. F. to your orators, the price thereof in the bill of particulars filed with the declaration in said suit being alleged to be $200. Your orators have filed in the said action two pleas: first, the plea of *non assumpsit;* and second, a special plea to the effect that the said E. F. warranted the said horse to be sound and free from defect. Your orators allege that the said E. F. made his bill of sale of the said horse to your orators, in which bill of sale the said E. F. covenanted to warrant, and did warrant, the said horse to be sound and free from defect. The said bill of sale has been lost or destroyed, and your orators are unable to produce the same on the trial of the said action, and your orators are unable to establish the

[41] This form is taken from the one used in Russell v. Dickeschied, 24 W. Va. 63, as reconstructed from the report and the record. The elements of this form have been approved recently in Eskridge v. Thomas, 79 W. Va. 322, 91 S. E. 7, L. R. A. 1918C, 769.

It will also be observed that it is stated in the form of the bill here given that the discovery is absolutely necessary for the purposes of the plaintiff's defense in the action at law. This is not necessary in a pure bill of discovery. *Ante,* § 181.

said covenant by other testimony than the statement of the said E. F. And your orators further allege and charge that the truth of the matters aforesaid would fully appear in case the said E. F. would set forth the covenants contained in the said bill of sale, and specially the covenant aforesaid warranting the said horse to be sound and free from defect. Your orators can and will establish on the trial of the said action by other evidence that, at the time of the sale of the said horse to your orators by the said plaintiff, the said horse was not sound and free from defect, but on the contrary thereof was suffering then, and for a long time thereafter, from the disease called the ———, and of that disease subsequently died, and was, and continued, at and from the time of sale, or shortly thereafter, until his death, wholly valueless to your orators.

Your orators are advised that they can not safely defend themselves on the trial of said action without a discovery from the said E. F. touching said covenant in said bill of sale, and concerning the existence thereof, and forasmuch as your orators are remediless in the premises save by the aid of a court of equity, your orators pray that the said E. F. may be made a party defendant to this bill, and required to answer the same on his oath; that the said defendant may make a full and true discovery of all the matters aforesaid, and say whether or not at the time of selling the said horse to your orators, he, the said E. F., did not make a bill of sale of the said horse to them; and that the said E. F. disclose and say what were the covenants made by him in the said bill of sale according to the best of his knowledge, remembrance, information and belief. Your orators pray that proper process may issue. And they will ever pray, etc.

C——— D———,
L——— M———,

S., L. & C.,
Solicitors for the Plaintiff.

By Counsel.[42]

[*Add affidavit for the verification of such a bill.*]

[42] This form is taken from Sands, Suit in Equity (2d Ed.), pp. 81-83. As will be observed from reading chapter eight of this work, the form

No. 98.

§ 952. To obtain a divorce from the bonds of matrimony on the ground of adultery, and for alimony and an injunction.

The bill of complaint of Jane Doe against John Doe, filed in the circuit court of *Mason* county, and state of *West Virginia.*

I. Plaintiff complains and says that she is now, and has been for more than one year next preceding the institution of this suit, a resident and actual *bona fide* citizen of the said state, and a citizen of the United States of America.

II. Plaintiff further complains and says that on or about the ——— day of ———, 19—, she was duly and legally married to the said John Doe in the county of *Putnam* and state aforesaid, as will more fully and at large appear by the marriage record of said county of that year, an attested copy of which is herewith filed as "Exhibit A" and made part of this bill.*

III. This plaintiff further complains and says that, after said marriage, this plaintiff and the said defendant lived together as husband and wife continuously until the ——— day of ———, 19—, when, plaintiff for the first time being informed and knowing of the improper and adulterous conduct of the defendant hereinafter described, they separated and have not since cohabited.

IV. This plaintiff, further complaining, says, that she and the said defendant last lived and cohabited together as husband and wife in the said county of *Mason,* that this plaintiff now resides in the said county of *Mason,* as well also as the said defendant, and that said defendant's post-office address is ———.**

contains more than is really necessary to make it a valid bill of discovery, in that it avers the plaintiff's inability to prove the matters in the absence of the discovery sought by the bill. But as this is usually found in forms of this character, we have not eliminated that part of it. See Eskridge v. Thomas, 79 W. Va. 322, 91 S. E. 7, L. R. A. 1918C, 769, wherein are discussed and approved the elements of a bill seeking discovery in aid of a defense to an action at law.

V. This plaintiff further says that there are now living two children, the offspring of said marriage, whose names and ages are as follows: Mary, aged five years, and James, aged three years.

VI. This plaintiff, further complaining, says that she is informed and verily believes, and therefore charges the fact to be, that the said defendant, disregarding the solemnity of his marriage vow, has since said marriage committed adultery and had illicit carnal intercourse with one Mary Denn at the town of R———, in the county of ———, and state of *West Virginia,* on or about the ——— day of ———, 19—, and on divers times between that day and the ——— day of ———, 19—.

VII. This plaintiff, further complaining, says that the said defendant is the owner of [*here describe the real and personal property owned by the defendant, if any, giving its value*].

VIII. This plaintiff, further complaining, says that she is poor and hath no means to support herself and children and to prosecute this suit; and that the said defendant is able to supply all the necessities of this plaintiff and her said children, but wholly refuses and neglects so to do, and that this plaintiff is now compelled to accept assistance from relatives and friends, in order to subsist from day to day, and that this plaintiff and said children are but poorly supplied with clothing and other comforts suitable to their condition in life.

IX. This plaintiff further says that the said defendant threatens, and this plaintiff is apprehensive that he will carry his threat into execution, that he will sell all of his property hereinbefore mentioned and described, to prevent this plaintiff from obtaining alimony therefrom for the support of herself and said children, and that said defendant ought to be restrained by injunction from this Honorable Court from selling, assigning, incumbering, or otherwise disposing of the above-described property until the hearing of this cause, and until suitable provisions shall be made for their maintenance and support.

Plaintiff therefore prays that she may be divorced and forever freed from the bonds of matrimony now existing between her and the said defendant; that the care, custody and education of the said children may be awarded to this plaintiff; that this court will decree to this plaintiff such portions of the property of the said defendant, or such sums of money to be paid by the said defendant to this plaintiff, as this Court may deem proper and necessary for the maintenance of this plaintiff and said children; that the defendant may be required to pay to this plaintiff a sufficient sum of money to enable this plaintiff to employ counsel and to prosecute this suit, and for the support of this plaintiff and the said children during the pendency thereof; that the said defendant may be restrained by an injunction to be awarded by this court from selling, assigning, incumbering, or otherwise disposing of the property hereinbefore described, until the further order of this court; and that this plaintiff may have such other and further relief as the court may see fit to grant, and as in duty bound she will ever pray, etc.

Jane Doe,
By Counsel.[43]

G——— & A———,
Solicitors for the Plaintiff.

[*Add the proper affidavit, post No. 259, if in West Virginia, which must, in this case (see Code, 1916, c. 64, § 8), be by the plaintiff in person, and not by agent or attorney; or No. 262, if in Virginia.*]

[43] This form serves to illustrate the extent of the relief which may be afforded by a bill for a decree of divorce.

The form here given is drawn from those found in Puterbaugh, Ch. Pl. & Pr. (3d Ed.), 594-596.

In *West Virginia*, care should be taken to allege some one or more grounds of venue prescribed by W. Va. Code, c. 64, § 7. Failure to do so makes the bill demurrable, and renders the whole proceeding, at any stage thereof, subject to prohibition, as the court, in such case, is without jurisdiction. Jennings vs. McDougle, 83 W. Va. 186, 98 S. E. 162.

The present statute, by virtue of the amendment made in 1915, requires all the pleadings filed in a divorce case to be verified by the party in whose name they are filed. W. Va. Code, 1916, c. 64, § 8. It follows, as a matter of course, that any amended pleading must be verified in the same manner. Jennings v. McDougle, *supra*.

No. 99.

§ 953. For divorce on the ground of impotency.

[*As in form No. 98 down to the* *.]

Plaintiff further complains and says that the said defendant, at the time when this suit was instituted, was, and ever since has been, a resident of ——— county in the said state of ——— [*or state some other ground of venue as prescribed by West Virginia Code, c. 64, § 7, Virginia Code, § 2259*], and that the post-office address of the said defendant is ———

Plaintiff further complains and says that immediately after the said marriage took place your orator discovered that the said C——— B———, at the time of her intermarriage with your orator as aforesaid, was and has continued to be naturally impotent, and physically incapable of entering into the marriage state; that, etc. [*here state the particular character of the impotency*]; so that the said marriage could not and can not be consummated by the sexual intercourse of the parties.

And the plaintiff further says that, as he is informed and believes, and so charges the fact to be, the said impotency and physical incapacity of the said C——— B——— still exists and is incurable.

Plaintiff therefore prays that the bonds of matrimony now existing between the plaintiff and the said defendant may be dissolved, that they may be forever divorced from each other, and grant unto plaintiff such other and further relief as to the court may seem meet, and as in duty bound he will ever pray, etc.

A——— B———,
By Counsel.[44]

J——— S——— S———,
Solicitor for the Plaintiff.

[*In West Virginia, append the proper affidavit, post No. 259, which, in this case (see W. Va. Code, c. 64, § 8), must be by the plaintiff in person, and not by agent or attorney.*]

[44] This form is taken from Puterbaugh, Ch. Pl. & Pr. (3d Ed.), 590. As to what constitutes natural or incurable impotency of body as a ground of divorce, see Hogg, Eq. Princ., § 490.

No. 100.

§ 954. To obtain a divorce a vinculo matrimonii because of penitentiary sentence.

[*As in No. 98 down to the **, omitting the allusion to adultery in paragraph III.*]

And this plaintiff further says that at the October term, 19—. of the circuit court of ——— county, state of ———, and before the institution of this action, the defendant was duly convicted of a felony, to-wit, the crime of burglary, and duly sentenced by said court to confinement in the penitentiary of said state for ——— years, and in pursuance of said sentence the defendant is now confined in the penitentiary.

[*Prayer as in form No. 99, and other averments as the case may demand, as in No. 98.*]

A——— B———,
By Counsel.

G——— I——— N———,
Solicitor for the Plaintiff.

[*In West Virginia, append the proper affidavit, post No. 259, which, in this case (see W. Va. Code, c. 64, § 8), must be by the plaintiff in person, and not by agent or attorney.*]

No. 101.

§ 955. To obtain a divorce from the bonds of matrimony because of conviction of an infamous offense.

[*As in No. 98 down to the **, omitting the allusion to adultery in paragraph III.*]

Plaintiff further says that prior to the solemnization of her marriage as aforesaid, to-wit, at the September term, 19—, of the circuit court of ——— county in the said state, the defendant was duly convicted of an infamous offense, to-wit, of the crime and offense of robbery, and duly sentenced by said court to confinement in the penitentiary of said state, for the term of ——— years, and in pursuance of said sentence said defendant was confined in said penitentiary for said term, which said conviction, sentence and confinement were without the knowledge of this plaintiff at the time of her marriage, as

aforesaid, and only recently came to plaintiff's knowledge, on or about the ——— day of ———, 19—, at which time, by reason whereof, plaintiff and said defendant separated and have not since cohabited with each other.

[*Prayer as in form No. 99, and other averments as the case may require, as in form No. 98.*]

A——— B———,
By Counsel.[45]

F——— O——— B———,
Solicitor for the Plaintiff.

[*In West Virginia, append the proper affidavit, post No. 259, which, in this case (see W. Va. Code, c. 61, § 8), must be by the plaintiff in person, and not by agent or attorney.*]

No. 102.

§ 956. To obtain a divorce from the bonds of matrimony because of three years' desertion.

[*As in No. 98 down to the **, omitting the allusion to adultery in paragraph III.*]

Plaintiff further complains and says that the said John Doe, wholly regardless of his marriage covenants and duty, to-wit, on the ——— day of ———, 19—, wilfully deserted and absented himself from this plaintiff without any reasonable cause therefor, for the space of three years and upwards next preceding the institution of this suit; and has continued in such desertion and yet continues so to absent himself from this plaintiff. [*Add such other averments as the case may demand, as in form No. 98, with such prayer as the nature of the relief requires, as in form 98 or 99, as the case may call for.*]

John Doe,
By Counsel.

E——— F———,
Counsel for Plaintiff.

[*In West Virginia, append the proper affidavit, post No. 259, which, in this case (see W. Va. Code, c. 64, § 8), must be by the plaintiff in person, and not by agent or attorney.*]

[45] The foregoing form, as well as form No. 100, are predicated upon what is said as to the necessary averments in bills of this kind in § 124 of this work.

No. 103.

§ 957. To obtain a divorce from the bonds of matrimony because of pregnancy at the time of marriage.

[*As in form 98 down to the *, mutatis mutandis.*]

And this plaintiff further says that he and the said defendant are now residents of the county aforesaid, and were at the time of the institution of this suit [*or state some other ground of venue as prescribed by W. Va. Code, c. 64, § 7, Va. Code, § 2259*]; and that said defendant's post-office address is ———.

Plaintiff further says that at the time of his marriage to the said defendant she, the said defendant, without the knowledge of this plaintiff, was *enciente* by a person other than this plaintiff, but whose name is unknown to this plaintiff [*or, if the name of the party be known, set it out in the bill*].

Plaintiff further says that it only recently came to his knowledge, on the ——— day of ———, 19—, that the said defendant was *enciente* as aforesaid; at which time, and by reason of plaintiff's obtaining such knowledge, plaintiff and said defendant separated and have not since cohabited with each other.

[*Add prayer, signatures of counsel and party, and verification, as in form 99.*]

No. 104.

§ 958. To obtain a divorce from the bonds of matrimony where the wife had been notoriously a prostitute before marriage.

[*As in form 98 mutatis mutandis down to the *.*]

This plaintiff further says he and the said defendant now reside in the county of Mason, and did reside there at the institution of this suit [*or state some other ground of venue as prescribed by W. Va. Code, c. 64, § 7, Va. Code, § 2259*]; and that said defendant's post-office address is ———.

This plaintiff further says that prior to his said marriage to the said defendant she, the said defendant, without the knowledge of this plaintiff, was notoriously a prostitute.

This plaintiff further says that upon learning the said fact this plaintiff ceased to live with said defendant, and they have not since cohabited.

[*Add prayer, signatures of party and counsel, and verification as in No. 99.*]

No. 105.

§ 959. To obtain a divorce a mensa et thoro for cruel treatment.

[*After the usual caption.*]

Your orator, A. B., respectfully represents unto Your Honor that he is a resident of the county of ———, and state of ———, is an actual *bona fide* citizen of said state and a citizen of the United States of America, and has been such resident, for more than one year next preceding the institution of this suit; that on the ——— day of ———, 19—. he was lawfully married to the said defendant, C. B., whose maiden name was C. D., in ——— county, in the state of ———, as will more fully appear from the marriage records of said county for said year, an attested copy of which, so far as it relates to said marriage, is filed herewith, marked "Exhibit A." and made a part hereof; that your orator resided with the said defendant until the ——— day of ———, 19—, when he was compelled to leave and cease living with her in consequence of the ill-treatment hereinafter mentioned; that during the time he so lived with the said C. B. he always conducted himself toward her with kindness, and as a true and indulgent husband, supplying all her wants and necessities, according to the best of his means and ability, and suitable to his and her condition in life.

Your orator further represents that the said C. D., not regarding her marriage relations and duties, has, since the said intermarriage, been guilty of extreme and repeated cruelty toward your orator, in this, that she is a woman of great austerity of temper, and very frequently during the past ——— years, indulged in violent sallies of passion, and used

toward your orator very obscene and abusive language without any provocation whatever, and frequently refused to prepare your orator's meals, and perform such other household duties as it was incumbent upon her to perform; and, on numerous occasions during the time mentioned, has used personal violence toward your orator, which he did not feel disposed to resent, further than to defend himself, on account of her sex; and particularly your orator charges, that on or about, etc., etc., at etc., the said C. B., without any provocation whatever, struck your orator a violent blow over the head with a club; and again, on or about, etc., the said C. B. again attacked your orator in their house and severely beat and bruised him with a chair, and broke the chair in pieces; and that on or about, etc. [*set forth each act of violence according to the facts*].

Your orator therefore prays that the said C. B. may be made a defendant to this bill; that your orator may be divorced from the said C. B., *a mensa et thoro*, and grant unto your orator such other and further relief as to equity may seem meet and as duty bound he will ever pray, etc. A. B.,

J. G. M., By Counsel.[46]

Solicitor for the Plaintiff.

[*In West Virginia, append the proper affidavit, post No. 259, which, in this case (see W. Va. Code, c. 64, § 8), must be by the plaintiff in person, and not by agent or attorney.*]

No. 106.

§ 960. To obtain a divorce a mensa et thoro because of reasonable apprehension of bodily hurt.

[*As in No. 98 down to the **, omitting the allusion to adultery in paragraph III.*]

Plaintiff further complains and says that on the day and year last aforesaid at the county and state aforesaid the said

[46] As to what constitutes cruel treatment within the meaning of the divorce law, see Hogg, Eq. Princ., § 494, where the matter is considered. Also see, Davenport v. Davenport, 106 Va. 736, 56 S. E. 562; Goff v. Goff, 60 W. Va. 9, 53 S. E. 769; Maxwell v. Maxwell, 69 W. Va. 414, 71 S. E. 571; Huff v. Huff, 73 W. Va. 330, 80 S. E. 846, 51 L. R. A. (N.S.) 282; Wills v. Wills, 74 W. Va. 709, 82 S. E. 1092, L. R. A. 1915B, 770.

defendant used to, of and concerning this plaintiff vile and abusive epithets, and then and there without any just or reasonable cause cursed plaintiff and accused her of being an unchaste woman and also did threaten the life of the said plaintiff; and this plaintiff was compelled to and did flee from her home to save herself from severe injury and bodily harm; and the defendant threatened to take the plaintiff's life if she again returned to live with him. [*Add such other averments as the case may demand, as in form No. 98, with such prayer as the nature of the case requires, as in form 98 or 99, and add the signatures of the plaintiff and her counsel and verification as prescribed in preceding form.*]

No. 107.

§ 961. To obtain a divorce a mensa et thoro because of abandonment or desertion.

[*As in No. 98 down to the **, omitting the allusion to adultery in paragraph III.*]

And this plaintiff further says that, on the day and year last aforesaid, the said defendant willfully and without any just or reasonable cause therefor, deserted and abandoned this plaintiff, and wholly refused to live and cohabit with her any longer as her husband, and from thence hitherto up to the time of instituting this suit has continually absented himself from her, and refused to return and live with her as a husband, and still does so, without any guilt or fault on the part of this plaintiff.

[*Add such other averments as the case may demand, as in form No. 98, with such prayer as the nature of the relief requires, as in form 98 or 99, adding signatures of party and counsel and verification as prescribed in form No. 98.*]

No. 108.

§ 962. To obtain divorce a mensa et thoro because of habitual drunkenness.

[*As in form No. 98 to the *, and then as in No. 103 to the end of the first paragraph.*]

The plaintiff, further complaining, says that for a long time last passed, and prior to the bringing of this suit, the said de-

fendant has been guilty of habitual drunkenness, and is now guilty of the same.

[*Conclude as in form No. 107.*]

No. 109.

§ 963. For dower in an ordinary suit by a widow.

[*After the usual caption.*]

Complaining, showeth unto the court your complainant, Ellen F., that your complainant is the widow of John F., who recently departed this life intestate in this county; that the said John F. was, during the marriage between him and your complainant, seized of estates of inheritance in certain real estate situate in this county and the counties of M. and N., which real estate is as follows, to-wit: a certain tract of land in this county conveyed to the said John F. by J. R., by deed dated the ——— day of ———, 19—, recorded in the office of the clerk of the county court of said county, in Deed Book No. ———, at page ———, an attested copy of which is filed herewith, marked "Exhibit A," and asked to be taken and read as a part of this bill; a certain tract of land situate in the said county of M. conveyed to the said John F. by H. S., by deed bearing date on the ——— day of ———, 19—, and duly of record in the office of the clerk of the county court of said last-named county, in Deed Book No. ———, at page ———, a certified copy of which is herewith filed as "Exhibit B" and made a part of this bill; a certain tract of land in the said county of N. conveyed to the said John F. by S. T., by deed dated as of the ——— day of ———, 19—, and recorded in the office of the clerk of the county court of said N. county, in Deed Book No. ———, at page ———, an office copy of which is herewith filed, as a part hereof, marked "Exhibit C."

Your complainant further showeth that the said John F. died seized of all the said real estate and that your complainant's dower, or her right of dower, therein has in no manner been lawfully barred or relinquished; that the following per-

sons are the only children and heirs-at-law of said John F., to-wit: Jane F., Susan F., Robert F. and Thomas F., the last named of whom is an infant under the age of twenty-one years; that your complainant is entitled to have her dower assigned in the said real estate, and she desires the same to be assigned to her.

In tender consideration whereof, your complainant prays that the said Jane F., Susan F., Robert F. and Thomas F. may be made parties defendant to this bill; that the said adult defendants be required to answer the same on their corporal oaths; that a guardian *ad litem* be assigned the infant defendant, Thomas F., to defend his interests in this suit, and that the said guardian *ad litem* answer the said bill; that proper process issue; that your complainant's dower in the said real estate be assigned, set out and allowed to her by the decree of your honorable court; that all proper orders may be made, and all proper inquiries be directed, and that all such other, further and general relief may be afforded your complainant as the nature of her case may require, or to equity shall seem meet. And your complainant will ever pray, etc.

C. D.,
Solicitor for the Plaintiff.

ELLEN F.,
By Counsel.[47]

No. 110.

§ 964. For dower by widow against an alienee of a former husband.

[*As in No. 109 to the end of the first paragraph, then say, beginning a new paragraph:*]

Your complainant further showeth that the said John F., your complainant has been informed and believes and so avers,

[47] This form is taken from Sands, Suit in Equity (2d Ed.), pp. 38, 39. See Hogg, Eq. Princ., §§ 81-98, where the subject of dower is treated.

The part of the form calling upon the defendants to answer on oath may properly be omitted. In *West Virginia*, this part of it would be treated as surplusage in cases in which the bill is not sworn to.

conveyed the said real estate to the said M. O. [*or*, that the said John F. conveyed the said real estate to the said M. O., by deed dated the ——— day of ———, 19—, of record in the office of the clerk of the county court of ——— county, in said state, in Deed Book No. ———, at page ———, an attested copy of which is filed herewith, marked "Exhibit D," and made a part hereof], but in the deed of conveyance your complainant did not unite, and she avers that her dower in said real estate has in no manner been lawfully barred or relinquished; that your complainant is now entitled to dower therein and has demanded of the said M. O. her dower in the same, but that the said M. O. refuses to assign and set out her said dower, alleging that she is not entitled to any dower in the said real estate.

Your complainant desires that her dower in the same may be assigned, allotted and set over to her in this suit.

In tender consideration whereof, your complainant prays that the said M. O. may be made a party defendant to this bill, and required to answer the several statements therein on his corporal oath; that proper process issue; that your complainant's dower in the said real estate be assigned, set out and allotted to her, etc., etc. [*as in last form to conclusion as the case may require*].[48]

No. 111.

§ 965. For the foreclosure of a mortgage.

[*After the usual caption.*]

Your orator, A——— B———, of, etc., respectfully represents unto Your Honor, that on, etc., the said C——— D———, of, etc., being indebted to your orator in the sum of ——— dollars, made and delivered to your orator his certain promissory note of that date, and thereby promised to pay to your

[48] The above form is taken from Sands, Suit in Equity (2d Ed.), 39, 40.

The part of the bill calling for an answer under oath may be dispensed with.

orator, ——— after date, the said sum of ——— dollars, with interest thereon at the rate of ——— per cent., per annum, as will more fully appear by the said note, ready to be produced in court, and by the copy of the same herewith filed, marked "Exhibit A," and made part of this your orator's bill of complaint.

Your orator further represents unto Your Honor that, to secure the payment of the sum and interest above mentioned, the said C——— D——— and the said D——— D———, his wife, on the ——— day of ———, 19—, by their deed of that date, conveyed to your orator, in fee simple, the following described parcel of land, with its appurtenances, situate in the said county of ———, to-wit: [*here describe the premises*] subject, however, to a condition of defeasance upon the payment of the principal sum and interest aforesaid, according to the tenor and effect of the said promissory note; which deed was, on the ——— day of ———, 19—, duly acknowledged, and afterwards, on the ——— day of ———, 19—, in said year, filed for record in the office of the clerk of the county court of the county of ——— aforesaid, and duly recorded in Deed Book No. ———, at page ———, as by the said deed and its accompanying certificates of acknowledgment and recording, ready to be produced in court, and by an attested copy thereof herewith filed, marked "Exhibit B," and made a part of this bill, will more fully appear.

Your orator further represents unto Your Honor, that the said C——— D——— has not yet paid the said principal sum of ——— dollars, nor such interest thereon, nor any part thereof, although the same long since became due; by means whereof the said mortgaged property has become forfeited, subject nevertheless to redemption in equity by the said C——— D———, his heirs and assigns.

Your orator further represents unto Your Honor, upon information and belief, that the said E——— F——— and G——— H———, of ———, have, or claim, some interest (the precise nature whereof is unknown to your orator) in the mortgaged premises aforesaid, as purchasers, mortgagees, judgment

creditors, or otherwise, but such interests, if any there be, have accrued since, and are subject to, the lien of your orator, by virtue of the said deed of mortgage.

Therefore, inasmuch as your orator is without remedy in the premises, except in a court of equity, your orator prays that the said C——— D———, D——— D———, E——— F——— and G——— H———, be made parties defendant to this bill, and may be required to make full and direct answer to the same; that an account may be taken in this behalf, by or under the direction of the court; that the said defendant, C——— D———, may be decreed to pay to your orator whatever sum shall appear to be due him upon the taking of such account, together with the costs of this proceeding; that said mortgaged premises may be sold, as the court may direct, to satisfy such debt and costs; and that your orator may have such other, further and general relief in the premises as equity may require and to Your Honor shall seem meet, and as in duty bound he will ever pray, etc.

A——— B———,
By Counsel.[49]

C——— H——— D———.
Solicitor for the Plaintiff.

No. 112.

§ 966. To set aside a fraudulent conveyance.

The bill of complaint of C. C. M., plaintiff, against J. S. C., G. C. B., trustee, M. J. C., C. E. H. and W. H. T. S., defend-

[49] It will be observed that the above form asks for the sale of the property and not for the foreclosure of the mortgage, strictly so called.

The practice in the Virginias, Sands' Suit in Equity (2d Ed.), 580, as well as elsewhere generally, directs a sale of the mortgaged premises. Hitchcock v. U. S. Bank, 7 Ala. 386; Boyer v. Boyer, 89 Ill. 447; Jefferson v. Coleman, 110 Ind. 515, 11 N. E. 465; Catterlin v. Armstrong, 101 Ind. 258; Shaw v. Heisey, 48 Iowa 468; Bacon v. Cottrell, 13 Minn. 194; Harrington v. Birdsall, 38 Neb. 176, 56 N. W. 961; Miles v. Stehle, 22 Neb. 740, 36 N. W. 142; Lockard v. Hendrickson (N. J. 1892), 25 Atl. 512; Denton v. Ontario County Nat. Bank, 150 N. Y. 126, 44 N. E. 781; Bolles v. Duff, 43 N. Y. 469, 10 Abb. Prac. (N.S.) 399, 41 How. Prac. 355; Benedict v. Gilman, 4 Paige (N. Y.) 58; Green v. Crockett, 2 Dev. & B. Eq. (22 N. Car.) 390; Bresnahan v. Bresnahan, 46 Wis. 385, 1 N. W. 39; Shields v. Simonton, 65 W. Va. 179, 63 S. E. 972.

ants, filed in the circuit court of ——— county, and state of West Virginia.

The plaintiff complains and says that on the *28th day of November, 1898,* the said J. S. C. made his certain promissory note in writing and thereto subscribed his name, and thereby promised six months after the date thereof to pay to the order of the defendant, C. E. H., one hundred dollars at the *Merchants' National Bank of West Virginia,* at ———; and the said plaintiff alleges that, after the making of said promissory note and before the maturity thereof, the said C. E. H. endorsed and delivered the same to the defendant, W. H. T. S., and the said S., before the maturity of said note, endorsed and delivered the same to one R. W., and that said W., before the maturity thereof, endorsed and delivered said note to said plaintiff; all of which will more fully and at large appear by said promissory note with the several endorsements thereon herewith filed, marked "Exhibit No. 1," and prayed to be read as part hereof.

The said plaintiff, further complaining, says that on the *3rd* day of *September, 1899,* he recovered a judgment predicated upon said promissory note on the law side of the circuit court of ——— county, in the state of *West Virginia,* against the said J. S. C., under the name of J. C., and said codefendants, C. E. H. and W. H. T. S., for the sum of $———, with interest thereon from said *3rd* day of *September, 1899,* until paid and costs thereof, amounting to $———, as will appear by certified copies of said judgment and the taxation of said costs herewith filed, marked "Exhibit No. 2" and "Exhibit No. 3," respectively, and prayed to be read as part hereof, and that said judgment is still in full force and effect, and remains wholly unpaid and entirely unsatisfied.

The said plaintiff, further complaining, says that on the *18th* day of *August, 1899,* the said defendant, J. S. C., was the owner in fee of a tract of *125* acres of land, situate on the waters of *Reedy creek,* in said county of ———, and conveyed to said C. by one S. H., by deed dated the *22nd* day of *October,*

1870, and now of record in the office of the clerk of the county court of said ——— county, in Deed Book No. *1*, page *200;* and that on the *19th* day of *August, 1899*, the said defendant, J. S. C., conveyed the said tract of *127* acres to said defendant, G. C. B., in trust, to secure unto the said defendant, M. J. C., payment of the note of the said defendant, J. S. C., for the sum of *$1,000*, payable in one year after the date thereof, viz., *August 19, 1899*, which said trust conveyance is of record in Deed of Trust Book No. ———, at page ———, of the records in said clerk's office.

The said plaintiff, further complaining, says that he is informed and believes and upon such information and belief he charges that the said defendant, M. J. C., was on the said *19th* day of *August, 1899*, and is now the wife of said defendant, J. S. C., and was his wife on said *22nd* day of *October, 1870.**

The said plaintiff, further complaining, says that said conveyance of the *19th* day of *August, 1899,* was made by said grantor therein for the sole purpose of hindering, delaying and defrauding his creditors and especially to evade, hinder and delay the payment of said promissory note first above mentioned, of which fraudulent intent the said M. J. C. had notice before and at the time of said conveyance, and which note was then a subsisting obligation against the said J. S. C., and said conveyance was made and caused to be recorded by said defendant only some fourteen days before said judgment was rendered by the circuit court of said county of ———, and the suit in which said judgment was rendered was then pending therein.

The said plaintiff, further complaining, says that the said J. S. C., at the time he made said conveyance, was, and still is, insolvent; that the supposed debt evidenced by the said promissory note for the sum of $1,000 was, and is, wholly pretended, and that no consideration whatever therefor passed from the said J. S. C. to the said M. J. C.; that the said conveyance executed by the said J. S. C. was purely voluntary and

wholly without consideration deemed valuable in law; and that in executing the said conveyance and the said note thereby secured the said J. S. C. and M. J. C. had no other purpose than the fraudulent design above charged.

The said plaintiff therefore prays that said deed of the *19th* day of *August, 1899,* be set aside and declared void as voluntary and fraudulent so far as the plaintiff's rights and interests are concerned; that said *125* acres mentioned therein be sold to satisfy the said judgment and the costs of this suit; and grant to the plaintiff such general relief as the nature of his case may require as to equity shall seem meet.

C——— C——— M———,
By Counsel.[50]

C——— E——— H———,
H——— C——— F———,
Solicitors for the Plaintiff.

[50] The form here given, taken from the record in the case of Miller v. Cox, 38 W. Va. 747, 18 S. E. 960, with some modifications, is used in 3 Whitehouse, Eq. Prac., 2089.

In Riley v. Carter, 76 Md. 581, 25 Atl. 667, 19 L. R. A. 489, 35 Am. St. Rep. 450, it was contended that the bill did not sufficiently aver that the act charged was done with fraudulent intent. The bill alleged that the deeds in question "were made with intent to delay, hinder and defraud the creditors of the defendants." It was insisted that this averment of the bill was only an inference and not a fact, and that the demurrer did not admit the truth of the conclusion sought to be drawn. As to this matter the court, in its opinion, says: "We, however, think the averment legally sufficient, and that it charges with certainty a fact which the demurrer admits. There is no substantial difference whether it is charged that the deeds were made with the 'intent,' or that they did actually delay, hinder and defraud. Hilliard, in his work on Bankruptcy (p. 13, § 25), says: 'It is in general expressly provided that acts of bankruptcy must be done with "intent" to delay creditors, and this intent, rather than the actual result, is held to constitute the essence of the act. If the allegation in the bill had omitted "the intent" and simply charged that the deeds, as executed, "hindered, delayed and defrauded" the creditors of the grantor, the legal effect would have been the same.' In the case of Schuman v. Peddicord, 50 Md. 563, Robinson, J., delivering the opinion of this court, said: 'Nor is it necessary, in order to bring the conveyance within the spirit of the statute, that there should be an "actual intent" on the part of the grantor to perpetrate a fraud. If the necessary effect and operation of the instrument be to

No. 113.

§ 967. To set aside fraudulent conveyance by corporation made to secure some of its officers.

[*After the usual title and address as in No. 1.*]

The plaintiffs complain and say that the said V. C. S. Company is a joint stock company, duly incorporated under the laws of the state of ———, and hath been ever since the year 19—; that the purpose and object of said corporation is to

hinder, delay or defraud creditors, the legal presumption is that it was made for that purpose.' Grover v. Wakeman, 11 Wend. 187 [25 Am. Dec. 624]; Sturdivant v. Davis, 9 Ired. 365; Enders v. Swayne, 8 Dana 103; Nicholson v. Leavitt, 6 N. Y. 510 [57 Am. Dec. 499]; Janes v. Whitebread, 20 L. J. C. P. [N. S.] 217."

"The specific allegations of the bill are not as broad as they might be to cover the case made by the evidence. It does charge that the object and purpose of Tate & McDevitt in making the subsequent sales thereof was to avoid delivery of the lumber to plaintiffs, and to avoid repaying plaintiffs the balance of the advances made by them on said lumber, and that Gates & Co., and Stover had notice thereof. This charge taken in connection with other allegations we think equivalent to a charge of intent to wholly defraud plaintiffs; but as the answers deny this, it would have been better pleading to have charged also that the sales were made for the purpose of hindering and delaying plaintiffs in the collection of their debt; for the terms defraud, hinder and delay are not equivalent terms, and to hinder or delay are as much condemned by the statute, section 3099, Code, 1906, as to wholly defraud a creditor. *Edgell* v. *Smith*, 50 W. Va. 349, 355, 356. And as the court says in the case just cited, quoting, at page 356: 'But in order to render a deed fraudulent, it is not necessary that the debtor should intend to entirely defeat the creditor in the collection of his claim. Creditors are entitled not only to be paid, but to be paid as their claims accrue, and a debtor has no more right to postpone payment simply for his own advantage, than to defeat it altogether. A purpose to delay and hinder a creditor is therefore fraudulent, although the debtor may honestly intend that all his debts shall ultimately be paid. * * * The words "hinder," "delay," and "defraud" are not synonymous.' The allegations of the bill, taken as a whole, however, we regard equivalent to charging in the terms of the statute intent not only to wholly defraud, but also to hinder and delay plaintiffs." Halfpenny v. Tate, 65 W. Va. 296, 298, 299, 64 S. E. 28.

As to the propriety and expediency of filing copies of the conveyances above described as exhibits, see *ante*, § 933, note 19.

dig or bore for salt and other minerals, and to manufacture and market the same, as well also as to mine for and market coal, and to sell goods; all of which will appear more fully and at large by reference to a certificate of incorporation found in the acts of the legislature of ———, for the year 19—, pages 167 and 168, and made part hereof.

The plaintiffs say that said corporation erected in the town of ———, in said county, a large and excellent salt furnace, at a cost of about *$90,000,* including salt wells, sheds, coal and salt cars, and the sinking of a coal shaft to mine coal for the said furnace; that said company purchased a tract of land containing *one* or *two* acres from W. H. and wife by deed of *April 20, 19—,* and recorded in the recorder's office of said county, in Deed Book No. 22, at pages 211 and 212, and also a tract from J. R. M., as appears by deed from said M. and wife to said company dated *October 1, 19—,* and recorded in the recorder's office of said county, in Deed Book No. 22, at page 381, upon which said property said furnace was erected.

The plaintiffs say that said company, on the *7th* day of *February, 19—,* executed a deed of trust to the said J. U. M., trustee, to secure to the defendant, P. H., an alleged loan of money of *$14,386.46-100,* but which loan was never in fact made, which deed of trust is recorded in the recorder's office of said county, in Trust Deed Book No. 1, at pages 90, 91 and 92; that said V. C. S. Company purchased from A. L. S. another *thirty* acres of coal land, then and now worth not less than *$30,000,* by deed bearing date of April 5, 19—, and recorded in the recorder's office of said county in Deed Book No. ———, at page ———; and from the same parties, on the ——— day of ———, 19—, one and one-fifth acres of land, worth at least the sum of *$2,000;* and that said company became the owner of much other real as well as personal property, including a valuable lease of coal lands from A. L. K. and W. H., all of which is fully described in a deed of trust from the said V. C. S. Company to said H. R. H., trustee, dated *August 13, 19—,* of record as hereinafter described, a copy of which is filed as

an exhibit herewith, marked "Exhibit A," and made part hereof.

These plaintiffs say that in the month of *January, 19—*, the board of directors of said V. C. S. Company elected said E. C. H. its president, and also constituted him its agent and general manager, and as such said H. took charge of and conducted all the business of said company until some time in the fall of 19—, and is still its president as well as its business manager and agent under the assumed name of the A. C. and S. Company; that during this period the said E. C. H. had complete charge and control of the books of said company, and employed the bookkeeper for said company, and still has such charge and control and employs the bookkeeper thereof under said new name; that the said E. C. H. *easily* kept the control and management of the business affairs of said company, for the reason that he, the said E. C. H., owned the controlling interest in the capital stock of the said V. C. S. Company; and that the board of directors of said company for the years 19— and ———, and probably for the years 19— and ———. was composed of said E. C. H., C. L. H., P. H., R. W., near relatives of said E. C. H., and C. K., the bookkeeper and employe of said E. C. H., and that during all that time, or at the least during the years 19— and 19—, the said board of directors was composed of persons closely related to said E. C. H., either by the ties of business, affinity or consanguinity.

These plaintiffs say that said E. C. H., as president of said board of directors and as agent of said company, executed a promissory note for the sum of *$12,000*, purporting to be made by said V. C. S. Company, payable to his own order in five days after the date thereof, on the *13th day of August, 19—*, and that on the same day the said company, by its said president, and C. L. H., its secretary, executed a deed of trust to the defendant, H. R. H., trustee, on all the property, real and personal, belonging to said company to secure said E. C. H. as endorser on certain promissory notes alleged to have been given by said company, and also to secure the payment to said H.

of the said *$12,000*, said deed of trust, among other things, providing that said H.'s debt of *$12,000* should have precedence over all other debts mentioned in said trust deed; all of which will more fully and at large appear by reference to the said trust deed itself, of record in the recorder's office of said county in Trust Deed Book No. ———, at page ———, an attested copy of which is herewith filed, marked "Exhibit A," and made part hereof.

Plaintiffs say that the said V. C. S. Company, on *July 1, 19—*, executed a promissory note payable to the order of the plaintiff, J. H., six months after the date thereof, in the sum of *$2,415.00-100*, with interest at ten per cent. per annum, which note has been assigned to the plaintiff, E. H., wife of the said J. H., and no part of which has ever yet been paid; all of which will more fully and at large appear by reference to said note itself, which will be produced for inspection on the demand of any party interested and a copy of which is herewith filed, marked "Exhibit B," and made part of this bill.

And plaintiffs further say that the plaintiff, J. H., and his minor son, J. H., worked for the said V. C. S. Company, at its special instance and request, until there was due them the sum of *$267.37-100*, all of which has been assigned or transferred to the plaintiff, E. H., and which sum of *$267.37-100* is still due and owing from said company, no part of the same having ever been paid; all of which will more fully appear by the exhibits marked "C" and "D," respectively, executed by said company, filed herewith and made part of this bill.

These plaintiffs now charge that all of said notes set out and described in said "Exhibit A" were without consideration and were made and given solely to hinder, delay and defraud the just creditors of the said V. C. S. Company, and particularly these plaintiffs, and done, too, at the instance and under the direction, management and control of the said E. C. H.

These plaintiffs say that on the *7th* of *October, 19—*, a sale of the property under the said deed of trust to J. U. M., trustee, to secure the defendant, P. H., an alleged loan of *$14,386.-*

46-100, took place, at which said P. H., became the purchaser thereof for *$6,100,* and on the same day, to-wit, *October 7, 19—,* the said P. H. and wife conveyed the same property to said E. C. H. for the ostensible sum of *$21,000,* but which conveyance was without any consideration whatever, he, the said E. C. H., being a favorite nephew of the said P. H.

These plaintiffs say that a sale took place under said deed of trust dated *August 13, 19—,* at the special instance and request of the said E. C. H., which sale was made in the early part of *September, 19—,* and included the following property for the following sums of purchase money: one thirty-acre tract of land for *$500,* a tract containing one and one-fifth acres for *$100,* right of way for *$100,* and the coal under K. and H. tract for *$100;* all of which was purchased by said E. C. H., president of the said V. C. S. Company, for the aggregate sum of *$800,* but which property was then and is now well worth the sum of *$35,000.*

These plaintiffs say that on the *2nd* day of *October, 19—,* a certificate of incorporation issued in the name of the A. C. and S. Company upon the application of said E. C. H., C. L. H., his brother, R. W., Jr., his brother-in-law, A. V. and J. H., then in the employ of said E. C. H. as president and agent of said V. C. S. Company, the latter of whom was steadily in his employ as such president and agent for many years, it being alleged at the time of said application that *$40,000* had been subscribed to the capital stock of said company, and *$4,000* thereof paid, of which capital stock it is alleged that said E. C. H. holds *$39,600* worth, and the remaining four stockholders above mentioned $100 each.

Plaintiffs now allege that nothing whatever has ever been subscribed to the capital stock of said A. C. and S. Company, that no part of its capital stock has ever been paid, that the said C. L. H., R. W., Jr., A. V. and J. H. have paid nothing toward the capital stock therein, and that they are not *bona fide* stockholders in said A. C. and S. Company, but allowed their names to be used in connection with said company as

stockholders therein only to subserve the fraudulent ends and purposes of the said E. C. H. and said V. C. S. Company, in their endeavor to defraud the creditors of said company.

These plaintiffs further say that on the *10th* day of *October, 19—*, the said E. C. H. and wife conveyed to the said A. C. and S. Company, for the ostensible consideration of *$34,175*, alleged to have been paid in the certificate of the stock of said company (but, indeed, the said conveyance was without consideration), the following land and property: the said thirty-acre tract of land, the said tract containing one and one-fifth acres, the said right of way, the coal under the said K. and H. lease, town lot No. 10 in block D, in the town of ———, lots Nos. 6, 7, 11 and 12 in square No. 4 in said town, and also a certain lot theretofore conveyed by J. L. S. to said E. C. H.

These plaintiffs say that none of said liens, sales and conveyances nor the issuing of said certificate of incorporation in the name of the A. C. and S. Company were *bona fide*, and were made or caused to be made by the said A. C. and S. Company, its officers and directors, with the intent to defraud its creditors of their just claims, and that the said A. C. and S. Company is none other than the said V. C. S. Company under a new name, assumed for the purpose of defrauding the creditors of said company, as the said alleged A. C. and S. Company occupies precisely the same site as the old one, operates the same property and has almost precisely the same franchises.

These plaintiffs say that the sales under said deed of trust were not made in conformity to law, and were so made as to enable the purchasers at said sales to obtain the property sold thereunder at a sacrifice [*stating the facts which show illegality of the sales*].

The plaintiffs say that the said E. H. is the wife of the said J. H., and that they are now living together as such near the town of ———, in said county, and that said P. H. is the uncle of said E. C. H.

These plaintiffs now pray that the said sale made by said J. U. M., trustee, as aforesaid, be set aside and held for naught,

as well also as the said sale made by said H. R. H., trustee, as aforesaid, so far as said sale relates to said E. C. H.; that the said pretended company, under the assumed name of the A. C. and S. Company, be declared, together with its president, directors and agent, a trustee holding the property now in its name as a trust fund for the payment of its just creditors; that the plaintiff, E. H., have a decree for the payment of her said debt against said company, that the same be paid her within a reasonable time to be fixed by the court, and, in default thereof, that then said property, or so much thereof as may be necessary, be sold for the payment thereof; and grant unto these plaintiffs such other, further and general relief as to equity and good conscience may seem meet.

J——— H——— and
F. & H., E——— H———,
Solicitors for the Plaintiff. By Counsel.[51]

No. 114.

§ 968. To set aside voluntary conveyance to the prejudice of the rights of creditors.

[*As in No. 112 according to the facts in the particular case down to the *, and then continue as follows:*]

The said plaintiff further says that the said conveyance of the *19th* day of [*giving its date*] was made without consideration; that nothing of any value whatever was given by said [*the grantee in the deed, or the beneficiary in the trust deed, as the case may be*] to said [*the grantor*] as a consideration for said conveyance, and that the consideration therein expressed is merely simulated and pretended.

[*Add prayer and signatures as in No. 112.*][52]

[51] This form is taken from the record of the case of Hope v. The Valley City Salt Company, 25 W. Va. 789.

This is a well-considered case with reference to the rights of creditors as against the directors and officers of a corporation when dealing with the corporate property.

As to the propriety or expediency of filing additional exhibits with the bill, see *ante*, § 933, note 19.

[52] See 2 Thornton, Ind. Pr. Forms, 938, 939.

No. 115.

§ 969. To set aside a fraudulent conveyance—Short form.

[*Title and address as in form No. 1.*]

Plaintiff complains and says that on the ——— day of ———, 19—, the defendant, C——— D———, was the owner in fee of ——— acres of land situate in ——— district, ——— county, and state of ———; that on that day the plaintiff lent said C——— D——— the sum of $———, for which said C——— D——— made and delivered his promissory note to the plaintiff, a copy of which is herewith filed, marked "Exhibit A," and made a part of this bill; and that no part of the debt evidenced by said note has been paid or in any manner discharged.*

Plaintiff further complains and says that on the ——— day of ———, 19—, an after said note had become due and payable, the said C——— D——— by deed of that date, now duly of record in Deed Book No. ———, at page ———, of the records in the office of the clerk of the county court of said county, conveyed said tract of land, which is fully described in said deed, to said E——— F———, for the ostensible consideration of $———, all of which will more fully and at large appear from said deed, an attested copy of which is herewith filed, marked "Exhibit B," and made part of this bill.

Plaintiff further complains and says that said deed of conveyance is voluntary and without consideration of any kind; that the same was made by said C——— D——— with intent to hinder, delay and defraud his creditors, and especially the plaintiff, of which intent the said E——— F——— had notice; and that when said deed was executed the said C——— D——— was, and now is, insolvent.[53]

[*Add proper prayer and signatures as indicated in No. 112.*]

[53] It will be observed that in the above form two distinct grounds for relief are alleged; one, that the conveyance is voluntary, and the other, that the conveyance is fraudlent. A bill thus framed gives the plaintiff this advantage: That although the plaintiff may fail to prove that the deed is fraudulent, it will be necessary for the defendant to prove that the deed or conveyance rests upon a valuable consideration, else the plaintiff will still prevail. *Ante*, § 568.

No. 116.

§ 970. To set aside a conveyance or transfer so far as the same creates a preference.

[*After caption and commencement as in Nos. 6 and 24, respectively, proceed as in No. 115 down to the *, omitting the introductory clause, "Plaintiff complains and says that."*]

Your orator further sheweth that on the ——— day of———, 19—, and after said note had become due and payable, the said C——— D——— executed his deed of trust, now duly of record in the office of the clerk of the county court of said county, in Trust Deed Book No. ———, at page ———, conveying a certain tract of land therein described to the said I——— J———, the trustee therein named, for the purpose of securing the payment of two promissory notes therein described, one of which is payable to the defendant, E——— F———, and the other to the defendant, G——— H———, which are in the sum of two thousand dollars and fifteen hundred dollars, respectively, all of which will more fully and at large appear by reference to said trust deed itself, an attested copy of which is herewith filed, marked "Exhibit B," and made part of this bill.

Your orator further sheweth that he is informed and believes and so alleges the fact to be that before and at the time when said deed of trust, "Exhibit B," was executed, he, the said C——— D———, was not only indebted to the said plaintiff as hereinbefore mentioned, as well also as to the said E——— F—— and G——— H———, but likewise in large sums of money to other parties, unsecured creditors of the said C——— D———, and that all of the said indebtedness hereinabove mentioned remains unpaid, nor has any part thereof been paid, as your orator is informed and believes and so avers.

Your orator further sheweth that at the time of the execution of the said deed of trust, a copy of which is filed herewith as "Exhibit B," the said C——— D——— was, and now is, insolvent; that the said C——— D——— has only about

two hundreds dollars' worth of personal property; and that the said land is not worth to exceed ——— dollars, and can not be sold for a greater amount than the said sum of ——— dollars, while the indebtedness of the said C——— D——— is far in excess thereof, amounting, as your orator is informed and believes and so alleges, to about the sum of ——— dollars.

Your orator further sheweth that the said C——— D——— executed the said deed of trust for the purpose of attempting to create a preference in behalf of the said E——— F——— and G——— H———, and that if the said deed of trust is permitted to stand it will operate to create a preference in favor of the said E——— F——— and G——— H———, as against your orator and the other creditors of the said C——— D———, contrary to the statute in such case made and provided.

Your orator therefore prays that said deed of trust, bearing date on the ——— day of ———, 19—, as aforesaid, a copy of which is filed as "Exhibit B" with this bill, may be set aside and held for naught, so far as the same attempts to, or does, create a preference among the creditors of the said C——— D———, and that the same may be taken and held to be for the benefit of all the creditors of said C——— D———; that the land embraced in said deed of trust may be sold under a decree of this court and the proceeds distributed *pro rata* among all the creditors of the said C——— D———, who shall come into this suit and contribute to the costs and expenses thereof; and grant unto your orator such other further and general relief as to equity may seem meet, and as in duty bound he will ever pray, etc.

A——— B———,
By Counsel.[54]

J——— G——— S———,
Solicitor for the Plaintiff.

[54] This form is based upon the cases of Wolf v. McGugin, 37 W. Va. 552, 16 S. E. 797; Argand Refining Co. v. Quinn, 39 W. Va. 535, 20 S. E. 576; Mack v. Prince, 40 W. Va. 324, 21 S. E. 1012; Johnson v. Riley, 41 W. Va. 140, 23 S. E. 698; Lawyer v. Barker, 45 W. Va. 468, 31 S. E. 964; Hogg, Eq. Princ., §§ 200-203, where the subject is considered.

No. 117.

§ 971. By guardian to sell lands of an infant in Virginia.

[*After the usual caption.*]

Your orator, A——— B———, guardian of C——— D———, an infant under twenty-one years of age, complaining, sheweth to the court that your orator was duly appointed, gave bond and qualified as the guardian of the said infant, on the ——— day of ———, 19—, in and by virtue of proceedings duly had before circuit court of ——— [*or*, before the corporation court of ———, *as the case may be*], as will more fully appear from a duly attested copy of the record of said proceedings herewith filed, marked "Exhibit A," and made a part hereof; that the said C——— D——— is the owner in fee simple of a certain parcel of real estate situate in [*here describe the real estate*], which is the only real estate or interest in any real estate owned by said infant; that the only personal property or estate owned by the said infant consists of [*here describe the same*]; that the said C——— D——— is over the age of fourteen years; that E——— D———, the father of said infant, would be its sole heir if the said infant were dead.[55]

* Your orator here sheweth unto the court that a sale of the aforesaid tract of land would promote the interests of the said

[55] "The guardian of the infant who brought the suit is one of the persons who would be entitled to the estate if the infant died under age, and he is not a party as such. At the same term at which the decree for the sale of the land was made, the guardian resigned his guardianship, and it was ordered that the suit abate as to him, and that it should proceed in the name of the second guardian who had qualified. At the sale of the land the first guardian became the surety of the purchaser of the land for the purchase money. He could never be heard to impeach the decree or the title acquired under it. But if he could, though the purchaser might object, the infant can not object because the purchaser has not acquired a perfect title." Durrett v. Davis, 24 Gratt. (Va.) 302.

"The statute requires that the bill shall be verified by the oath of the guardian of the infant. Though it may be most regular that this should be done when the bill is filed, this is not indispensable, and it is sufficient if it is sworn to at any time before the court acts upon it and decrees a sale." Durrett v. Davis, *supra*.

infant, because, as your orator avers [*here state the facts or grounds relied on to show that the interests of the infant would be promoted by said sale*].

Your orator further sheweth unto the court that the rights of no person will be violated by a sale of the said real estate.

Your orator therefore prays that the said infant, C——— D———, and the adult, E——— D———, be made parties defendant to this suit; that a suitable person be appointed guardian *ad litem* for the said infant; that the said parties and the said guardian *ad litem* be required to answer this bill under oath, as well also as the said infant defendant in his own proper person; that the said tract of land be sold and the proceeds of sale invested for the benefit of the infant as the court may direct; and that all proper orders and decrees may be made and all proper accounts and inquiries be directed; and for such other, further and general relief as the nature of the case may require, or may seem proper in the premises. And your orator will ever pray, etc.

A——— B———, guardian of C——— D———,
Q——— G——— S———, By Counsel.
Solicitor for the Plaintiff.

[*Append affidavit as in No. 264.*][56]

No. 118.

§ 972. By a guardian to sell lands of an infant in West Virginia.

[*After the usual caption.*]

Your orator, A——— B———, guardian of C——— D———, an infant under twenty-one years of age, complaining, sheweth to the court that your orator was duly appointed, gave bond and qualified as the guardian of the said infant, on the ——— day of ———, 19—, in and by virtue of proceedings duly had

[56] This form is taken, with modifications, from 2 Bart., Ch. Pr. (2d Ed.), 1271, 1272. It is also found in Sands, Suit in Equity (2d Ed.), 71.

before the county court of ——— county, in the state of West Virginia, as will more fully appear from a duly attested copy of the record of said proceedings herewith filed, marked "Exhibit A," and made a part hereof; that the said C——— D——— is the owner in fee simple of a certain parcel of real estate situate [*here describe the real estate*], which is the only real estate or interest in any real estate owned by said infant; that the only personal property or estate owned by the said infant consists of [*here describe the personal estate*]; and that the said C——— D——— is over the age of fourteen years.

Your orator further sheweth that there are no other persons interested in the said real estate [*if any one else be interested, continue as follows:*] except J——— H———, who is jointly interested as a part owner thereof [*or whatever the interest of the other person may be, setting it out fully*].

[*Continue as in No. 117 from* *.]

No. 119.

§ 973. By guardian to lease infants' lands.

[*After proper caption.*]

Complaining showeth unto the court, your orator, R. M., guardian of James C., an infant under the age of twenty-one years, that your orator was duly appointed, gave bond and qualified as the guardian of the said infant, on the ——— day of ———, 19—, in and by virtue of proceedings duly had before the county court of ——— county, in the state of West Virginia [*if in Virginia*, before the circuit court, *or* before the corporation court, *as the case may be*, of ———], as will more fully appear from a duly attested copy of the record of said proceedings herewith filed, marked "Exhibit A," and made a part hereof; that the said James C. is entitled to a fee simple estate in a tract of land in the said county, containing ——— acres, lying on the *Three Chopped Road*, near the lines of L. D. and M. D., devised to the said James C. by his father, Robert C., by his last will and testament, duly admitted to probate in

the office of the clerk of the county court of said county, an attested copy of which will is herewith filed, marked "Exhibit B," and is prayed to be taken and considered as part of this bill; that by the said will the estate of the said James C. is charged with an annuity of $150 per annum in favor of his mother, Sarah C., during her natural life, and that in order to raise this annuity, and meanwhile to support and educate the said James C., it will be necessary either to sell or lease the said land; and that the personal property owned by the said James C. consists of [*here describe it*], and is wholly insufficient for these purposes.

Your orator states that the said land and the personal property before described is all the property in which the said James C. is interested. The said James C. is now over fourteen years of age, and his fortune justifies his liberal education, and he desires to be liberally educated, and in the opinion of your orator it will greatly promote his interests if the income of his property is expended in his education at the best schools in the state. This tract of land before mentioned is very valuable, and Robert R. has offered, if a lease of ten years be given him, to lease the same at the rental of $1,000 per year. Your orator believes that the letting of the said land for that time at that rate would promote the interests of the said James C., and that in such letting the interests of no other person would be damaged; and, if the said offer of R. R. is not accepted, that the said land should either be leased or sold to some other person or persons.* If the said James C. should die the following person would be his heirs-at-law: George C. and Edmund C., two brothers of Robert C., the father of the said James C.

In tender consideration whereof, and for as much as your orator is remediless in the premises, your orator prays that the said James C., George C. and Edmund C. may be made parties defendants to this bill, and required on their corporal oaths to make answer to the several statements of this bill; that a guardian *ad litem* be appointed to the said James C. to defend

his interests in this suit, who shall also answer the statements of this bill under oath; that proper process issue; that the said offer of lease by the said R. R. be accepted, and that a proper commissioner be appointed by the court, in conjunction with your orator, guardian as aforesaid, or that your orator be appointed as such commissioner, to execute a good and sufficient lease of the said lands to the said R. R. for the said term of ten years at said rental per year; or if the court should not deem the same a sufficient rental for the said land, that the court decree that the said land be leased for ten years at public auction, or sold at public auction at such time and on such terms as to the court shall seem fit; that all proper orders and decrees may be made, and inquiries be directed, and that all such other further and general relief may be afforded your orator as the nature of his case may require, or to equity shall seem meet. And your orator will ever pray, etc.

R——— M———,
Guardian of James C.,
By Counsel.[57]

S. & L.,
Solicitors for the Plaintiff.

[*Add affidavit, No. 260, if in West Virginia, or if in Virginia, No. 264.*]

No. 120.

§ 974. By guardian to lease infants' lands in West Virginia.

[*As in No. 119 down to the* *.]

Your orator states that there are no other persons interested in the said real estate. [*If any one else be interested, continue as follows:* except J——— H———, who is jointly interested as a part owner thereof, *or whatever the interest of the other person may be, setting it out fully.*]

[*Conclude with the prayer and affidavit as in No. 119.*]

[57] The above form is taken from Sands, Suit in Equity (2d Ed.), pp. 73-75, and is adapted to the practice obtaining in such cases in the state of Virginia, and may be easily adapted to such a case as contemplated by the statute of West Virginia, in conjunction with the following form.

No. 121.

§ 975. Against guardian and his surety by ward, after attaining majority, for a settlement and final accounting.

[*After the usual caption.*]

The plaintiff, M——— A——— L———, who is now of lawful age, complains of the said defendants, F——— L——— and J——— W———, and says, that the defendant, F——— L———, was, on the ——— day of ———, 19—, by the ——— court, of said county, appointed the guardian of this plaintiff, and on the same day the said F——— L——— gave bond as such guardian with the said J——— W——— as his surety, and then qualified as such guardian, all of which will more fully and at large appear by reference to said orders of appointment and qualification, and a copy of said bond, which are herewith filed as exhibits "1," "2" and "3," respectively, and made parts of this bill.

This plaintiff further complains and says that, as such guardian, a large sum of money, to-wit, on the ——— day of ———, 19—, came into the hands of the said F——— L——— from one O——— C———, amounting in the aggregate to the sum of ——— dollars; that on or about the ——— day of April, 19—, another sum of money came into the hands of said F——— L——— as such guardian from the sale of certain real estate belonging to this plaintiff, which last sum amounted to ——— dollars.

This plaintiff further says that afterward, on the ——— day of ———, 19—, the said defendant, F——— L———, had an *ex parte* settlement of his accounts as such guardian, which was duly recorded in the office of the clerk of the county court of said county, a copy of which is herewith filed, as a part hereof, marked "Exhibit No. 4."

This plaintiff further complains and says that after the said settlement, at what precise time or times plaintiff is unable to state, there came into the hands of said defendant, F——— L———, as guardian aforesaid, two other sums of money, one the sum of ——— dollars and the other the sum of ——— dollars.

The plaintiff further says that since the said pretended settlement of the accounts of said F——— L———, and since this plaintiff has arrived at the age of majority, the said F——— L——— has paid to her at different times small sums of money, amounting in the aggregate to not more than ——— dollars, leaving a balance still due this plaintiff, after deducting all proper credits, from said defendant of ——— dollars, no part of which has ever been paid, but still remains wholly unpaid; and that said defendant F——— L——— has at different times since his pretended settlement promised to settle with said plaintiff and to pay her any sum remaining due to this plaintiff, but that nevertheless the said defendant wholly refuses to pay the same or any part thereof.

This plaintiff further says that the said pretended settlement made as aforesaid by the said F——— L——— is incorrect in this, to-wit, that the said F——— L——— has not charged himself with any interest on the said sums of money received by him, as aforesaid. And the said defendant has credited himself with the sum of ——— dollars as having been expended by him on behalf of this plaintiff, which was not expended, and for which the said defendant ought not to have any credit.

This plaintiff now prays that this cause may be referred to a commissioner to take and report an account of the transactions of the said F——— L——— as guardian aforesaid; that the said plaintiff may have a decree for any balance due this plaintiff against the said F——— L——— and his surety, the said J——— W———; and grant unto this plaintiff such other further and general relief as to equity may seem meet, and as in duty bound she will ever pray, etc.

M——— A——— L———,
By Counsel.[58]

D——— C——— J———,
Solicitor for the Plaintiff.

[58] This form is the usual one for an accounting against a guardian, and it will not be overlooked that the suit is against the guardian and his surety. This is permissible only to avoid a multiplicity of suits in a further action against the surety in case the debt can not be made against the principal.

No. 122.

§ 976. Of injunction to judgment at law.

[*After the usual title, address and commencement.*]

I. T. R. recovered a judgment at law against your orator in the ——— court of ——— county, at the ——— term, 19—, for $———, with interest thereon from the ——— day of ———, and $——— costs. A certified copy of the said judgment, marked "Exhibit A," is herewith filed and is prayed to be read as a part of this bill.[59]

II. An execution has been issued upon said judgment, and is now in the hands of ——— ———, sheriff of the county of ———, who is about to levy the same upon your orator's property.

III. Your orator avers that the said judgment is unjust, that he had and has a full and complete defense to the action in which it was rendered, which he could and would have made thereto had he not been prevented from doing so by the action of the plaintiff, whereby your orator was deceived and lulled into false security, without any fault, laches or neglect on his own part.[60] For a more particular statement of the causes which prevented your orator from making defense to said action, he recites the following circumstances:

IV. The said judgment was recovered on a note drawn by your orator on the ——— day of ———, 19—, for the sum of

[59] Good pleading requires that the best evidence of the existence of the judgment should be produced, and hence the pleader should always exhibit with his bill a copy of the judgment sought to be enjoined. 2 Spelling on Injunctions and Other Extraordinary Remedies, § 996. See Parsons v. Wilkerson, 10 Mo. 713.

[60] If it should appear that the plaintiff in an injunction suit has been guilty of laches in applying for an injunction a court of equity will withhold its relief. This court requires due and reasonable diligence from all parties in suits as much so in cases of this character as in other instances. 1 Spelling on Injunctions and Other Extraordinary Remedies, § 87.

A bill seeking to enjoin a judgment and execution which does not so identify these as to make it appear what judgment and execution are meant, and which does not limit the prayer for injunction to any particular judgment and execution, is demurrable. Adams v. White, 23 Fla. 352, 2 So. 774.

$———, payable on the ——— day of ———, 19—, to the said T. R. The said note had, long before the institution of said action, been paid by your orator to the said T. R. At the time of said payment your orator was indebted to the said T. R. by four several notes, amounting in the aggregate, principal and interest, to *$1,260.50*. Your orator paid the said sum to the said T. R., and took his receipt for the same, the said receipt specifying for what the money was paid, and showing that the amount of the said note on which said judgment was recovered was embraced therein.

V. The three other notes were delivered to your orator by the said T. R. at the time of signing the said receipt, and the fourth note was also demanded by your orator, but the said T. R. stated that it was lost or mislaid, and that when he found it, it would be restored to your orator. The said receipt, and the three notes delivered to your orator, are herewith filed, marked as exhibits B, C, D and E, and are prayed to be read as parts of this bill.

VI. Some time after the payment of the said four notes, the said T. R. placed the fourth note, above referred to, which your orator had paid off as above recited, in the hands of a lawyer for collection, and the said lawyer thereupon instituted suit upon the same against your orator.

VII. Upon receipt of the process in said suit, your orator called on the said lawyer and exhibited to him his receipt aforesaid, by which payment of the said note was acknowledged. Upon seeing which, the said lawyer at once admitted that there was no cause of action, and promised that he would dismiss the suit of T. R. against your orator. Resting upon this assurance, your orator made no defense to the said cause, but the said suit was not dismissed as promised, but, on the contrary, judgment for the full amount of the said note, interest and costs, as before recited, was rendered against your orator.

VIII. Your orator further states that the said judgment was obtained without your orator's knowledge until the term of court at which it was rendered had expired. Your orator therefore alleges that the failure to dismiss the said action, as

promised, was in fraud of his just rights, and that the judgment rendered therein was unjust and should be set aside, and a new trial granted.

Forasmuch then as your orator is remediless, save in a court of equity, he prays that the said T. R. may be made a party defendant to this bill and required to answer the same in his own proper person, but not on oath, the same being hereby waived; that he, his agents, attorneys at law, and all others, be enjoined and restrained from proceedings to enforce said judgment in any way; that especially the said sheriff of the county of ——— be enjoined and restrained from levying the said execution now in his hands; that proper process issue, and all proper orders be made; that the said judgment be set aside, and a new trial of the said action at law be granted your orator, and that all such other, further and general relief may be afforded your orator as in the premises may be just and right. And your orator will ever pray, etc.

A——— B———,
By Counsel.[61]

Q., G. & S.,
Solicitors for the Plaintiff.

[*Add affidavit as indicated in Nos. 259, 263, depending upon the state in which the suit is brought.*]

[61] The above form, with slight modifications, is taken from 2 Bart., Ch. Pr. (2d Ed.), 1276. For the principles underlying the doctrine authorizing injunctions to judgments at law, see Hogg, Eq. Princ., § 268.

It will be observed that in the player the plaintiff asks that the judgment be set aside and a new trial of the action at law be granted. This the court will not do. As to this matter the author in Equity Principles, § 355, says: "Upon a bill in chancery to enjoin a judgment at law, and for a retrial, there must not be a decree before such retrial annuling the judgment and granting a new trial in the law court; but the judgment should stand as security for what may be found to be justly due, and until after the retrial, and the decree should direct an issue or issues as the case may require to be tried in the circuit court, to find what the nature of the case may demand, and upon the verdict coming in, the court should perpetuate or dissolve, either wholly or partially, the injunction awarded to the judgment against which plaintiff has sought relief. And where an injunction to a judgment is perpetuated only to

No. 123.

§ 977. For injunction against cutting timber pending an action of ejectment.

[*After the usual caption, title, address and commencement.*]

I. Your orator is the owner in fee of a certain tract of land situated in the district of ———, in the county of ——— and state of ———, as will more fully appear from your orator's title deed therefor, duly of record in the said county, in Deed Book No. ———, at page ———, a certified copy of which is herewith filed, marked "Exhibit A," and made part of this bill.

II. Your orator has held and owned the said tract of land for many years, under and by virtue of the said title deed, has paid the taxes thereon ever since, and is now the owner thereof, which ownership is shown by the said deed.

III. The chief value of said land is the growing and standing timber thereon, consisting of pine, poplar, walnut, ash and oak, and if said timber should be removed said property would be of comparatively little value.

IV. The defendant has recently set up some claim of title to said land, but upon what ground said claim is founded this plaintiff is unable to say; but plaintiff avers that such claim is wholly unfounded, as this plaintiff has the only title subsisting in and to said land.

V. The said C——— D———, by reason of said claim of title, has entered upon and taken possession of said land, and is now in possession thereof, cutting down and hauling away to the market the said standing and growing timber thereon, and threatens to continue to do so, and will do so until the said land is entirely denuded of its timber, unless restrained from so doing.

a part of it, or the reversal is only as to a part of it, the lien of the part not affected continues from the date of the judgment."

For form of a bill to restrain enforcement of a fraudulent judgment, based on Knapp v. Snyder, 15 W. Va. 434, see 3 Whitehouse, Eq. Prac., 2257.

VI. There is now a considerable quantity of timber that has been cut down, still lying upon the said land, and it has not yet been removed therefrom, but the said defendant threatens to remove and will remove it, unless inhibited from so doing.

VII. Your orator has instituted in the county aforesaid, in the circuit court thereof, an action of ejectment against the said C——— D——— to determine the validity of his title to said land as against the said C——— D———, and to oust him, the said C——— D———, from the possession and occupancy of the said land.

VIII. Your orator avers that said C——— D——— is the owner of no property whatever, either real or personal, as plaintiff is informed and believes and so charges the fact to be; that the said C——— D——— is insolvent; and that any judgment for damages which the plaintiff could obtain against him in an action at law would be entirely unavailing; so that if the said defendant is permitted to continue the cutting and appropriation of said timber to his own use, this plaintiff will be irreparably injured.

Your orator therefore prays that an injunction may issue, inhibiting and restraining the said C——— D——— from the further cutting of any of the standing and growing timber on the said land, and from the removal of any and all timber now on the premises thereof, which has been cut down by him, the said C——— D———, or otherwise, until the further order of this court; and grant unto your orator such other, further and general relief as to equity may seem meet, and as in duty bound, your orator will ever pray, etc.

A——— B———,
By Counsel.

T——— E——— D———,
Solicitor for the Plaintiff.

[*Add the affidavit, in West Virginia, as shown in No. 259, in Virginia, as in No. 263.*][62]

[62] This form is founded upon the case of Cox v. Douglass, 20 W. Va. 176, with such corrections as the opinion of the court of appeals indicated as necessary to make the bill sufficient. While this is an injunction suit for the purpose of restraining the cutting of timber

No. 124.

§ 978. Of injunction against closing right of way.

[*After the usual caption, address and commencement.*]

Your orator, A——— B———, is the owner in fee of a tract of land containing ——— acres, situate in the district of ———, in the county of ——— and state of ———, and has been such owner thereof since the ——— day of ———, 19—, by general warranty deed therefor, in which E——— F——— is the grantor, which deed is duly recorded in the office of the clerk of the county court of ——— county, in said state, in Deed Book No. ———, at page ———, an attested copy of which is herewith filed as "Exhibit A," and made part of this bill.

Your orator further says that the said E——— F——— was the owner of this land for about eighteen years prior to his sale thereof to your orator, that your orator has so been the owner of said land for nearly twelve years next preceding the institution of this suit, and that your orator and those under whom he claims have had continuous and exclusive possession thereof for nearly thirty years.

pending an action of ejectment involving the title to the land, it is the same form required in the case of the cutting of timber by an ordinary trespasser, where such trespasser is insolvent, or where the injunction is awarded upon other grounds of irreparable injury.

For a consideration of the subject of injunction, bearing on the principle underlying the form above given, see Hogg, Eq. Princ., §§ 235-238, 240, 241, and other sections under chapter 22 of that work.

In the more recent decisions, however, the earlier cases are disapproved, and it is no longer held necessary to allege insolvency in the trespasser, and hence inadequacy of legal remedy, in order to entitle the owner of land to injunctive process to prevent the cutting of timber.

"To obtain an injunction to prevent such a trespass it is not necessary to allege the insolvency of the trespasser nor any other circumstance, rendering an action at law futile or unavailing as a remedy for the injury. * * *

"In so far as they conflict with the principles here declared, the following decisions and others of their class are disapproved and overruled: *Marcum* v. *Marcum*, 57 W. Va. 285; *Curtin* v. *Stout*, 57 W. Va. 271; *Stephenson* v. *Burdette*, 56 W. Va. 110; *Burns* v. *Mearns*, 47 W. Va. 744; *Cresap* v. *Kemble*,

Your orator further sheweth that the said C——— D——— is the owner of a tract of land in said county and district containing ——— acres, for which he holds a deed duly of record in said clerk's office in Deed Book No. ———, at page ———, an attested copy of which is herewith filed, marked "Exhibit B," and made part of this bill. Your orator further represents that your orator's tract of land and that of the said C——— D——— constituted at one time a part of an entire survey of two thousand acres of land, which at various times has been sold and conveyed, so that its identity as a body or single tract is no longer in existence.

Your orator further represents that the only way whereby the public highway could and can be reached from your orator's said tract of land was and is along and through the said tract of land owned by the said C——— D———; that in order to get access to your orator's said tract, a right of way was laid off along, upon and through the said land of said C——— D———, extending from your orator's said tract to the public highway, which private road was laid out at the time when, and before, your orator's said tract of land and the tract of land now owned by the said C——— D——— were sold and set off from the said entire tract of two thousand

26 W. Va. 603; *Schoonover* v. *Bright*, 24 W. Va. 698; *Cox* v. *Douglass*, 20 W. Va. 175; *Western M & M. Co.* v. *Cannel Coal Co.*, 10 W. Va. 250; *Millan* v. *Ferrell*, 7 W. Va. 223." Pardee v. Camden Lumber Co., 70 W. Va. 68, 73 S. E. 82.

However, unless the plaintiff's title is undisputed, it is necessary, in order to obtain injunctive relief in such cases, to allege either that the plaintiff has instituted an action at law to adjudicate the legal title or that he is about to institute such an action. *Idem;* Pardee & Curtin Lumber Co. v. Odell, 71 W. Va. 206, 76 S. E. 343.

Consequently, in West Virginia, paragraph VIII of this form may now be safely omitted in all cases. Likewise, when the title to the land is not in dispute, paragraph VII may be omitted. But when the latter paragraph is omitted an allegation to the effect that the plaintiff's title is not in dispute should be substituted. But of course, if paragraph VIII should unnecessarily be included, it would be treated as surplusage and would in no way effect the sufficiency of the bill nor add to the burden of proof.

acres of land; that said private road is well marked, fenced on either side, and has been used as a right of way from the highway to your orator's said farm continuously, uninterruptedly, openly and adversely and under claim and color of right not only by your orator for his own purposes, but by all other persons having occasion to go to and from your orator's premises, in order to reach the said highway, and to reach your orator's premises coming from the said highway, for nearly thirty years next preceding the institution of this suit, with the knowledge and silence of the said C——— D———.

Your orator further says that such use of said private road has been uninterrupted and continuous for the period of time last above mentioned, until a day or two ago, when the said C——— D——— closed up that end of the road connecting with the said highway, by means of a board fence, and also closed up the same by running a fence across the said private road at the midway point between the said highway and where the said road intersects your orator's said farm; that thus closing said private road is such an obstruction as to prevent your orator from using the said road or in any way going from his said land to the said public highway, and operates to the great and irreparable injury of your orator in the use, farming and occupancy of his said tract of land.

Your orator has applied to the said C——— D——— and requested and demanded that he remove said obstructions, but the said C——— D——— positively refuses so to do, peremptorily prohibits your orator from doing so, and threatens your orator with personal injury should your orator attempt to remove said obstruction to said private road.

Your orator therefore prays that the said C——— D——— be compelled to remove said obstruction in and to the said private road, and to restore to your orator an open way through the said land of the said C——— D———, along and upon the land of the said C——— D———, from and upon which the said private way was long used and occupied as aforesaid; and grant unto your orator such other and further relief as to

equity may seem meet, and as in duty bound he will ever pray, etc.

A——— B———,
By Counsel.

J——— B——— M———,
Solicitor for the Plaintiff.

[*Add the affidavit as indicated in No. 259, or No. 263, depending upon which state the suit is in.*][63]

[63] This form is founded upon the cases of Rogerson v. Shepherd, 33 W. Va. 307, 10 S. E. 632, and Boyd v. Woolwine, 40 W. Va. 282, 21 S. E. 1020; Crosier v. Brown, 66 W. Va. 273, 66 S. E. 326, 25 L. R. A. (N.S.) 174, and upon the doctrine discussed and announced in Hogg, Eq. Princ., § 232; T. A. A. & N. M. R. Co. v. Pa. Co., 54 Fed. 746, 19 L. R. A. 395, *et seq.* Also see, Williams v. Green, 111 Va. 205, 68 S. E. 253.

In Toledo, A. A. & N. M. Co. v. Pennsylvania Co., 54 Fed. 746, 19 L. R. A. at page 393, the court in the course of its opinion, says: "The office of a preliminary injunction is to preserve the *status quo* until, upon final hearing, the court may grant full relief. Generally this can be accomplished by an injunction prohibitory in form, but it sometimes happens that the *status quo* is a condition not of rest but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant which he appeals to a court of equity to protect him from. In such a case courts of equity issue mandatory writs before the case is heard on its merits. *Robinson* v. *Byron*, 1 Bro. Ch. 588; *Lane* v. *Newdigate*, 10 Ves. Jr. 192; *Hervey* v. *Smith*, 1 Kay and J. 392; *Beadel* v. *Perry*, L. R. 3 Eq. 465; *London & N. W. R. Co.* v. *Lancashire & Y. R. Co.*, L. R. 4 Eq. 174; *Whitecar* v. *Michenor*, 37 N. J. Eq. 6; *Broome* v. *New York & N. J. Teleph. Co.*, 42 N. J. Eq. 141."

The latter case is quoted and approved in Powhatan Coal & C. Co. v. Ritz, 60 W. Va. 395, 403, 56 S. E. 257, 9 L. R. A. (N.S.) 1225.

And though the obstruction of a highway exists at the commencement of a suit to enjoin it, it may be abated by a mandatory injunction, as well as by a judgment that the obstruction be removed and the nuisance abated. Spelling, Inj. and Other Ex. Rem. (2d Ed.), § 397, citing Gardner v. Stroever, 89 Cal. 26, 26 Pac. 618.

"Where a bill alleges a state of facts which, if proven, show that the complainant is entitled to a right of way by prescription, it is not necessary for him to state further that the facts alleged constitute a right of way by prescription, as this is a mere conclusion of law following from the facts stated." Muncy v. Updyke, 119 Va. 636, 89 S. E. 884.

"Where a bill sets up a right of way as appurtenant to complainant's land and as a way of necessity, and also by virtue of a writing executed by the defendant, and the allegations of the bill are sufficient to support the claim to the way both as appurtenant and as a way of necessity, a demurrer on the ground of the insufficiency of the writing was properly overruled" Hammond v. Ryman, 120 Va. 131, 90 S. E. 613.

No. 125.

§ 979. Of injunction to judgment at law on the ground of after-discovered evidence.

[*After the usual address and caption.*]

Complaining, showeth unto the court your orator, James J., executor of the last will and testament of Merewether R., deceased, that on or about the ——— day of ———, 19—, the said Merewether R., then a resident of ——— county, in the state of ———, died testate, leaving a will and testament in which your orator is designated as executor thereof, which will is duly of record in Will Book No. ———, at page ———, of the records in the office of the clerk of the county court of said county, and which said will was duly proved before, and letters testamentary issued thereon to your orator by the *county* court of said county on the ——— day of ———, 19—, whereupon your orator forthwith gave bond and qualified as such executor; all which will more fully appear from attested copies of said will, the order of said court probating the same and said bond, filed herewith, as parts hereof, marked as exhibits "A," "B" and "C," respectively.

Your orator further showeth that one M. N. recently recovered in the ——— court of ——— county a judgment against your orator, as executor as aforesaid of said Merewether R., deceased, for the sum of *$1,000*, to be discharged by the payment of *$500* with interest thereon at the rate of six per cent. per annum from the ——— day of ———, 19—, until paid, and the costs, amounting to $———; that the said judgment was recovered on a bond executed by your orator's testator, Merewether R., and one Alexander R., in which bond the said Alexander R. was the principal debtor, and your orator's testator was the surety.

Your orator further states that when the action was brought on the said bond against your orator, and during the whole time the said action was pending, the said Alexander R. was out of the country, and though your orator made diligent enquiry for him he was unable to ascertain where the said

Alexander R. could be found, so as to communicate with him about the said alleged claim. The said judgment was recovered against your orator as such executor on the ——— day of ———, 19—. Your orator was wholly ignorant that any valid defense could be made to said action until some time after the judgment had been recovered, and after the term had expired at which said judgment was recovered. After the recovery of the said judgment, to-wit, on the ——— day of ———, 19—, the said Alexander R. returned to *Virginia,* and your orator immediately communicated with him about the said claim. The said Alexander R. informed your orator that the said debt had been paid, and sent to your orator a copy of the receipt, which had been given him by the said M. N. when the debt was paid. Your orator herewith files the said copy, marking it "Exhibit D," and the same is prayed to be taken and considered as a part of this bill.

Your orator is confident that if a new trial be granted the said M. N. will fail to obtain judgment for any sum against your orator as such executor. The said judgment is, as your orator verily believes, wholly unjust and inequitable, and should be set aside.

In tender consideration whereof, and forasmuch as your orator is remediless in the premises save by the aid of a court of equity, where matters of this kind are alone and properly cognizable, to the end that justice be done, your orator prays that the said M. N. may be made a party defendant to this bill and required on his corporal oath to make full answer to the several statements hereof as fully as if the same were here repeated, and he thereto specially interrogated; that the said M. N., his agents, attorneys, and all others, be enjoined and restrained from enforcing the said judgment, from issuing executions thereon, and otherwise proceeding to collect the same; that the said judgment be set aside, and that a new trial of the said action be granted your orator; that proper process issue; that all proper orders and decrees may be made, and that all such other further and general relief may be afforded

your orator as the nature of his case may require, or to equity shall seem meet. And your orator will ever pray, etc.

James J.,
Executor of Merewether R., Deceased,
By Counsel.[64]

John M. P.,
Solicitor for the Plaintiff.

[*Add affidavit as in Ch. XLVII, dependent upon the state in which the suit was brought. If in West Virginia, No. 260, or if in Virginia, No. 264.*]

No. 126.

§ 980. Of injunction against laying gas pipe on the plaintiff's premises.

[*After the usual caption and commencement.*]

I. Plaintiff is the owner in fee of about *one hundred and ninety* acres of land in ——— district, in said county of ———, conveyed to plaintiff by H. S. and wife by deed dated the ——— day of ———, 19—, duly of record in the office of the clerk of the county court of said county in Deed Book ———, at page ———, an attested copy of which is filed herewith, as a part hereof, marked "Exhibit A."

II. The defendant is a corporation duly incorporated under the laws of the state of ———.

III. The defendant proposes to lay a pipe under the public roads and through the lands of the plaintiff for the purpose of

[64] This form, with modification, is taken from Sands, Suit in Equity (2d Ed.), 89. For the law governing in cases of this kind, see Hogg, Eq. Princ., § 269, and the cases there cited.

As to the property of that part of the prayer asking that the judgment *be set aside*, see *ante*, § 976, note 61.

As to the propriety, or expediency, of filing exhibits with the bill, see *ante*, § 933, note 19.

It is now held necessary in West Virginia to allege in issuable form the appointment and qualification of a personal representative where he sues as such, and the *facts* showing such appointment and qualification must be alleged. Austin v. Calloway, 73 W. Va. 231, 80 S. E. 361, Ann. Cas. 1916E, 112, citing, among other cases, Judah, Exr. v. Fredericks, 57 Cal. 389, and Pelletreau, Exr. v. Rathbone, 1 N. J. Eq. 331.

conducting natural gas from a gas well on the farm of J. M., Esq., near ———, ——— county, to or near ———, in ——— county, and has staked and surveyed a route through plaintiff's land, and laid the pipe to within a short distance of his boundary line.

IV. Notices have been served by plaintiff on the agents and employes of the defendant not to enter plaintiff's land without first making compensation.

V. The defendant has not made or tendered compensation to plaintiff, and is about to enter upon plaintiff's land and occupy and use the same without any compensation whatever therefor to plaintiff offered or tendered, but with the purpose and intent to appropriate plaintiff's property and impair his use thereof without any authority therefor from the plaintiff and without due process of law.

VI. The proposed line of pipe, if constructed, will run along the public road beside, and within *four* feet of a board fence on plaintiff's said land, and pass between the house and barn thereon, within about *fifty* feet from each, and, if completed, will do plaintiff great and irreparable injury, and will deprive him of his constitutional right of property, without compensation or security tendered.

Your orator therefore prays that the said defendant may be enjoined and restrained, likewise its agents and employes, from entering upon the premises above described and laying thereupon or thereunder a pipe line for conducting natural gas until the further order of the court, and grant unto your orator such other and further relief as to equity may seem meet and as in duty bound he will ever pray, etc.

A——— B———,
By Counsel.[65]

M. C. A.,
Solicitor for the Plaintiff.

[*Add the usual affidavit for the verification of an injunction.*]

[65] The foregoing form is taken substantially from the plaintiff's amended bill in Sterling's Appeal, 111 Pa. St. 35, 2 Atl. 105, 56 Am. Rep. 246. In the lower court, a demurrer to the bill was sustained, but this judgment was reversed by the supreme court.

No. 127.

§ 981. Of injunction by mortgagee or cestui que trust against a mortgagor or grantor in trust deed, inhibiting the latter from cutting timber on the mortgaged or trust premises.

[*After the usual caption, address and commencement.*]

Your orator, on the ——— day of ———, 19—, lent to the defendant, C——— D———, the sum of ——— dollars, for which said C——— D——— gave to your orator his promissory note payable to the order of your orator ——— after its date, and to secure the payment of which defendant executed a mortgage [*or deed of trust, as the case may be*] on a certain tract or parcel of land situate in the district of ———, county of ———, and state of ———, fully described in said mortgage [*or trust deed*] now duly of record in the office of the clerk of the county court of said ——— county, in Deed Book [*or*, Trust Deed Book] No. ———, at page ———, an attested copy of which is herewith filed, marked "Exhibit No. 1" and made part of this bill.

Your orator further sheweth unto Your Honor that the said debt is still wholly unpaid, and that the lien existing upon the said property is still in full force and effect.

Your orator further sheweth unto Your Honor that the lands upon which the said mortgage [*or deed of trust*] was executed and is now subsisting, are wild lands without any valuable improvements, and have a fine growth of large oak and poplar timber thereon; that said lands after being divested or denuded of said timber will not, at a fair sale, bring anything near the amount of your orator's said debt, and that the said defendant is insolvent.

Your orator further sheweth unto Your Honor that the said defendant is now cutting timber on the said lands, and will continue to do so unless restrained, and intends to cut and remove all said timber, or the greater portion thereof, standing and growing upon said lands, and will do so unless restrained by the process of this court; and that if the said defendant is

permitted to remove the timber, or a large part thereof, from the said lands, the same will be insufficient and inadequate security for your orator's said debt, and your orator will therefore be irreparably injured.

Your orator therefore prays that the said defendant may be inhibited and restrained by an injunction to be awarded in this cause, from cutting or removing any more timber on or from the said lands until the further order of this court; that your orator may have a decree enforcing the lien of said mortgage against said lands; and grant unto your orator such other, further and general relief as to equity may seem meet, and as in duty bound he will ever pray, etc.

A——— B———,
By Counsel.

K——— & C———,
Solicitors for the Plaintiff.

[*Add the usual affidavit for the verification of an injunction bill.*][66]

[66] This form is based upon the doctrine announced in Henry v. Watson, 109 Ala. 335, 19 So. 413, which authorizes the issuance of an injunction to stay waste upon mortgaged premises, where its commission materially lessens the value of the property and renders it a precarious security for the debt. The same doctrine is found in 1 Spelling, Injunctions and Other Extraordinary Remedies (2nd Ed.), § 266, from which we quote as follows: "A mortgagee is entitled to an injunction against threatened waste by a mortgagor in possession which involves irreparable injury to the land, and will render the security inadequate; and the mortgagee is entitled to an injunction against such waste, without averring or proving that the mortgagor is insolvent. Upon his application, and upon a proper showing, an injunction may be granted at the suit of a mortgagee, to prevent the removal from the mortgaged premises of timber trees, cut down in waste of the security before service of the injunction, where the person against whom relief must be sought for the waste committed is insolvent, or where no redress can be obtained at law or in equity if the removal is permitted, or where there is fraud. But where the bill alleges neither of such considerations, and merely prays an accounting from the person who has committed the waste, an injunction will not be granted. Nor will waste by a mortgagor in possession be enjoined, unless the acts complained of may so impair the value of the property as to render it insufficient, or of doubtful sufficiency, as security for the

No. 128.

§ 982. Of injunction by receiver restraining interference with property in his possession.

[*After the usual caption and commencement.*]

Your orator, C. C. L., would respectfully represent that at the fall term, *1877*, of your court, he was appointed by an order of Your Honor's court receiver of the property of the S. C. Company, in ——— county, in the state of ———, in the chancery cause of S., trustee, etc., v. S. C. Company, *et al.*, pending in said court; that under such order he took possession of said property, and on the ——— day of *March, 1878,* J. H. R., sheriff of ——— county, levied a writ of *fieri facias* in favor of J. H. G. against said S. C. Company upon a lot of copper and brass, part of the property of said S. C. Company, upon its premises, and which is part of the property which was placed in your orator's hands as receiver as aforesaid; and that said J. H. R., sheriff as aforesaid, now has said copper and brass in his possession, and has advertised the same for sale by him under said levy, on *Saturday,* the *6th* day of *April, 1878.* Your orator has notified said R. not to sell the said property that is under the charge of your orator as receiver as aforesaid, and therefore not liable to levy or sale, but said R., sheriff, told your orator that G. had given him an indemnifying bond, and that he (R.) did not know but that it was his duty to go on with the sale, but that he himself would be glad if your orator would refer the matter to Your Honor.

Your orator, therefore, prays that Your Honor will make an order restraining and inhibiting said R., or any one else, from selling or otherwise disposing of or interfering with the said copper and brass levied on as aforesaid, or any other of the

debt. The value of the property should, however, remain largely in excess of the debt secured by it. A mortgagor in possession committing waste after a decree of foreclosure has been rendered, but before it has been executed, may be restrained by injunction."

property of said S. C. Company, which has been placed by the order of Your Honor's court in your orator's hands as receiver.

C. C. L.,
Receiver of S. C. Company,
By Counsel.[67]

D. L. R.,
Solicitor for the Plaintiff.

[*Append affidavit under form No. 260 if in West Virginia, No. 264 if in Virginia.*]

No. 129.

§ 983. To enjoin the erection of a nuisance.

[*After the usual caption, address and commencement.*]

Your orator resides at and owns the dwelling known as No. ———, on *N. Market street,* in the city of W———, and has there resided for the last ——— years, his family consisting of himself, his wife, three grown daughters, and two sons who are as yet quite young, and the usual servants and help of such a household.

Your orator avers that on the south side of his house he has a portico on which it is the habit of his family and friends to assemble and sit whenever the weather permits, and along the same side of his house are many of the windows and certain doors by which light, air and access and egress are admitted to and from his said house.

Your orator avers that immediately adjoining his said residence on the south side thereof and within ——— feet of the line of your orator's lot, and ——— feet from his dwelling, resides Mr. Mean Man, who has come there to reside only within the last thirty days.

Your orator avers that the former occupant of the property in which the said M. M. now resides was Mr. P. G., who, while he there resided, kept his premises in admirable order and condition, and was guilty neither of the offense now complained of against the said M. M., nor of any other objectionable con-

[67] This form is taken from the record of the case of Lewis v. Rosler, 16 W. Va. 334.

duct; nor, indeed, has any other occupant of the same, since your orator has resided in his dwelling aforesaid, given any cause for such complaint. But the said M. M. had only moved into the premises aforesaid a few days, when he established in close proximity to the line of your orator's lot, and within ——— yards from his dwelling, a pen and filled the same with hogs.

And your orator avers that the filth created by and the odor arising from the said hogs and the pen are such as not only to make it impossible, consistent with either pleasure or health, for your orator, his family, friends or servants to occupy the portico or to raise the windows of his dwelling; but should he leave it he probably could not secure a tenant at all for the premises, or if he did it would be at a ruinous sacrifice.

Your orator avers that the keeping of hogs by the said M. M. upon his premises is a nuisance and is not in any way essential to the enjoyment or profit of the said M. M., and if it were essential to either, your orator insists that he should not be allowed to keep them, when to do so is so injurious to your orator's property and destructive to his health and comfort.

Your orator therefore prays that the said M. M. may be made a party defendant to this suit and compelled to answer this bill; that the said M. M. may be compelled wholly to remove his said pen and his hogs from his premises, and that he may be enjoined from establishing the former and keeping the latter at any time thereon; and grant unto your orator such further and general relief as to equity may seem meet and as in duty bound he will ever pray, etc.

L——— C———,
By Counsel.[68]

Q. R. W.,
Solicitor for the Plaintiff.

[*Append the usual affidavit to a bill of injunction.*]

[68] The above form, with slight modifications, is taken from 2 Bart., Ch. Pr. (2d Ed.), 1287.

No. 130.

§ 984. To enjoin a nuisance by fouling a watercourse.

[*After the usual caption and commencement.*]

For ——— years last past plaintiff has been the owner of a farm in the township of ———, county of ———, and state of ———, conveyed to your orator by J——— R——— and wife, by deed dated the ——— day of ———, 19—, of record in the office of the clerk of the county court of said county in Deed Book No. ———, at page ———, an attested copy of which is filed herewith, marked "Exhibit A," and made a part of this bill; through which farm has ever flowed and now flows a stream known as ———.

On or about the ——— day of ———, 19—, said defendant erected a paper mill on said stream about ——— miles above said farm of plaintiff, and has continued to manufacture paper at said mill from thence until the present time.

In the use of said mill said defendant has employed, for cleaning rags, various noxious chemical preparations, and has permitted the same, after being used for said purpose, to flow into said creek, thereby rendering the water of the same unwholesome and unfit for domestic use and for stock to drink.

Before the erection of said mill plaintiff had, by the use of pipes, carried the water of said stream to his house, and was using it for domestic purposes, and had also watered his stock at said stream; but since the erection of said mill and the manufacture of paper thereat, the water of said stream, where it enters the farm of plaintiff and throughout its entire course, is so foul from the use of said chemicals as to be unfit to use either for domestic purposes or for stock to drink, and because thereof is not used by the plaintiff.

On the ——— day of ———, 19—, the plaintiff notified said defendant of the injury to the water and the cause of the same, and requested him to desist from any further pollution of the waters of said stream by said chemicals; but notwithstanding, said defendant has still continued said injury to the plaintiff.

If the defendant is permitted to continue the acts above enumerated polluting and befouling the said stream this plaintiff will be deprived of the necessary and legitimate use and enjoyment of his said farm and property, the value thereof will be greatly impaired, and he will be irreparably injured.

Plaintiff therefore prays that the said defendant may be restrained and enjoined from permitting the matter hereinbefore enumerated from flowing into the said stream and befouling and polluting the same, and that he may be required not to permit the said refuse and *debris* to be carried into the said stream as above stated, and grant unto your orator such other and further relief as to equity may seem meet and as in duty bound he will ever pray, etc.

A——— B———,

L. C., By Counsel.[69]

Solicitor for the Plaintiff.

[*Add the usual affidavit for the verification of an injunction bill.*]

No. 151.

§ 985. To enjoin the sale of property under a trust deed.

[*After the usual caption, address and commencement.*]

On the ——— day of ———, 19—, your orator executed a deed of trust to the said E——— F———, trustee, on a tract of land owned in fee by your orator, therein described, to secure to the defendant, C——— D———, the payment of a certain promissory note of even date therewith, which deed of trust is duly of record in the office of the clerk of the county court of said county, in Trust Deed Book No. ———, at page ———, an attested copy of which is herewith filed, marked "Exhibit A," and made part of this bill.

Your orator further sheweth that the rate of interest on said debt for which said note was given is ten per cent. per annum; that your orator paid the interest on said note for several years

[69] The foregoing form is taken substantially from 2 Thornton, Ind. Pr. Forms, 987.

at ten per cent., but received credit simply for the interest and no credit on the principal for the excess of usurious interest, which, in the aggregate, now amounts to the sum of ——— dollars, for which your orator, in equity and good conscience, should have a credit upon said debt.

Your orator further sheweth that he has made a large number of payments on said note, for one of which payments, to-wit, seventy-five dollars, made on the ——— day of ———, 19—, your orator has never received any credit upon the said note.

Your orator further sheweth that by crediting the said aggregate sum of usurious interest upon the principal of the said debt, and the said seventy-five dollars paid as aforesaid and not credited thereon, your orator would not owe anything at all upon the said debt.

Your orator further sheweth that although the said debt has thus been paid off and discharged, the said E——— F———, trustee as aforesaid, has advertised the said land for sale under the said trust deed in the ———, a newspaper published in said county, which sale is advertised to take place at ———, on the ——— day of ———, 19—, at the hour of ——— o'clock of that day; all of which will more fully and at large appear by a copy of said notice of sale, herewith filed, marked "Exhibit B," and made part of this bill.

Your orator further sheweth that he represented to the said trustee that the said debt has been paid off and discharged as aforesaid, and requested him, the said trustee, not to sell the said property but to file his bill in a court of equity for an adjustment and settlement of the accounts between your orator and the said C——— D——— arising upon the said loan, but the said E——— F——— failed and declined to do so.

Your orator therefore prays that the sale advertised to take place on the ——— day of ———, 19—, under the notice published in said newspaper as aforesaid be enjoined and restrained; that any sale under any other notice by the said trustee be inhibited, as well as any attempt at such sale, until the further

order of this court; and grant unto your orator such other further and general relief as to equity may seem meet, and as in duty bound he will ever pray, etc.

A——— B———,
By Counsel.[70]

L——— C——— S———,
Solicitor for the Plaintiff.

No. 132.

§ 986. To enjoin sale of property under deed of trust to secure payment of money borrowed from building and loan association.

The bill of complaint of M——— L——— G——— against B——— B——— & L——— Association, a corporation, and J——— W———, trustee, filed in the circuit court of K——— county, in the state of ———.

The plaintiff complains and says that the defendant B——— B——— & L——— Association is a corporation, created and organized under the laws of the state of ———; that on the ——— day of March, 19—, the plaintiff borrowed the sum of ——— dollars, and for the purpose of evading the usury laws, the said association required this plaintiff, as a mere shift and device, to become the owner of eight shares of stock in said association of the par value of one hundred dollars each.

The plaintiff further says that in order to get said loan she executed a bond payable to the said association as therein provided, and to secure the payment thereof the plaintiff executed a deed of trust on her property in said trust deed described, which property is situate in the town of ——— and state aforesaid, all of which will more fully and at large appear from

[70] The foregoing form is based upon the principles announced in Kerr v. Hill, 27 W. Va. 576; Curry v. Hill, 18 W. Va. 370; Richardson v. Donehoo, 16 W. Va. 688; W. Va. Code, 1913, c. 96, § 7; Norvell v. Hedrick, 21 W. Va. 523; Davis v. Demming, 12 W. Va. 246, 248, etc.; Va. Code, 1904, §§ 2815-2822; Hartman v. Evans, 38 W. Va. 669, 18 S. E. 810; Watterson v. Miller, 42 W. Va. 108, 24 S. E. 578; Hogg, Eq. Princ., §§ 248-250.

said trust deed which is duly of record in the office of the clerk of the county court of ——— county, in said state, in Deed of Trust Book No. ———, at page ———, an attested copy of which is herewith filed, marked "Exhibit A," and made part of this bill.

This plaintiff further says that as a condition to membership in said association she was required to pay to the defendant, in order to become a member of such association, one dollar per share, which amounted as a membership fee to the sum of eight dollars.

This plaintiff further says that she was required to pay each and every month to said association upon each one hundred dollars of her said loan as dues, ——— cents per month; as premiums, ——— cents per month; and as interest, ——— cents per month; making an aggregate monthly payment to said association, on account of and by reason of said loan, the sum of ——— dollars per month.

This plaintiff further says that it is further stipulated and agreed in said bond and trust deed that upon the failure of this plaintiff to pay such dues, premiums and interest for the period of ———, then the whole of said sum of ——— dollars, borrowed as aforesaid by this plaintiff, was to become due and payable, with the immediate right of sale under said trust deed by the said association.

This plaintiff further says that she paid to the said association, on account of the matters hereinbefore stated, the sum of ——— dollars and interest from the ——— day of March, 19—, and made no further payments thereon, at which time the association claimed a balance due from her of ——— dollars, and has advertised the said trust property for sale, to take place on the ——— day of ———, 19—, as will more fully and at large appear from the notice of sale, a copy of which is herewith filed, marked "Exhibit B," and made part of this bill.

This plaintiff further says that, upon becoming a member of such association as aforesaid, she made no bid offering any premium for said loan; that the said association fixed no minimum premium to be paid by the plaintiff on said loan in ad-

vance thereof, nor any particular instalment, nor did said association fix a lump sum as premium to be paid by this plaintiff for and on account of said loan; but that said association simply stipulated for a premium of ——— cents upon each one hundred dollars borrowed by this plaintiff from the said association, payable each and every month until the entire debt should be paid off and discharged, as will more fully appear by the said bond itself, as well as the said trust deed, reference being had thereto.

This plaintiff further says that she is entitled to credit for the sum of ——— dollars premiums paid as aforesaid upon her said loan, which amounts to the sum of ——— dollars at this time, and that being so credited this plaintiff is only indebted to the said association in the sum of ——— dollars, and not in the said sum of ——— dollars, as claimed by the said association as above stated; that said association declines to give this plaintiff credit for the aggregate of said premiums, and declares its intention to sell the said property to pay off the sum so claimed by it, and will do so unless inhibited and restrained by the process of this court.

This plaintiff therefore prays that an injunction may be awarded by this court inhibiting and restraining the said association and the said J——— W———, trustee, or either of them, from making sale of the said property under the said sale notice or under any other notice, or attempting to make sale thereof, until the further order of this court; that a reference to a commissioner in chancery be made of this cause to ascertain and report the true indebtedness of this plaintiff to the said association upon and on account of said loan; and grant unto this plaintiff such other further and general relief as to equity may seem meet, and as in duty bound plaintiff will ever pray, etc.

M——— L——— G———,
By Counsel.[71]

J——— W——— K———,
Solicitor for the Plaintiff.

[71] This form is founded upon the cases of Gray v. Baltimore Bldg. and Loan Asso., 48 W. Va. 164, 37 S. E. 533; McConnell v. Cox, 50 W. Va. 469, 40 S. E. 349; Floyd v. Nat'l Loan and Investment Co., 49

No. 133.

§ 987. To enjoin a municipal corporation from the creation of an illegal indebtedness.

[*After the usual caption and commencement.*]

I. Your orator sues on behalf of himself and all other taxpayers and persons similarly situated in and of the city of Parkersburg, in the county of Wood, and state of West Virginia.

Plaintiff's Interest.

II. Your orator is a resident and citizen of the city of *Parkersburg* and is a qualified voter and householder and freeholder therein, and is a taxpayer and the owner of valuable real and personal estate, situated and being in said city and assessed for and subject to taxation in and by the said city in the county and state aforesaid.

City of Parkersburg.

III. The city of *Parkersburg* is a municipal corporation and body politic, existing under the laws of this state, and its charter is contained in an act entitled "An act to amend and reduce into one the several acts incorporating the city of *Parkersburg,*" etc., being chapter 26 of the Acts of the Legislature for the year 1887, which is made a part hereof.

Plaintiff Aggrieved by the Action of the City Council.

IV. Your orator in common with all other citizens and taxpayers of said city is prejudiced and aggrieved by the onerous, oppressive and unconstitutional action of the council of said city in the attempted creation of unwarranted and unlawful indebtedness against said city, and in the fraudulent abuse of the trusts and powers imposed upon said council to the grievous

W. Va. 327, 38 S. E. 653; Miller v. Monumental S. & L. Assn., 57 W. Va. 437, 50 S. E. 533; Miller v. The Prudential Banking & T. Co., 63 W. Va. 107, 59 S. E. 977.

loss and hardship of your orator and other taxpayers in like situation with him. The facts in relation thereto are hereinafter more fully set forth.

Council Creates an Unlawful Indebtedness.

V. Your orator further shows that by the Constitution of West Virginia and by the charter of *Parkersburg* no indebtedness of any kind or for any purpose can be created against said city except by the assent of the qualified voters thereof expressed by a majority of three-fifths of such voters at an election held for the purpose, at which all matters relating to the creation of such proposed indebtedness shall be fully stated and submitted to such voters.

Your orator charges that under a pretended ordinance which said council undertook to pass on the *18th* day of *March, 1891* [*a copy of which is herewith filed marked "S. A." and made a part hereof*], and under a pretended contract bearing date the ——— day of *March, 1891*, referred to in said ordinance, the said council of said city sought fraudulently and unlawfully to create an indebtedness of at least $25,000 against said city, and to involve the said city and its taxpayers and to render them liable and indebted therefor.

Your orator charges upon his personal knowledge that no election has been held, and no vote has been taken, and no authority or assent of voters has been had with reference to any part of said pretended ordinance or contract, but he is advised and charges that the said ordinance and contract have been attempted on behalf of said city with the T.-H. E. Company, a corporation created as your orator believes under the laws of Massachusetts, named in said pretended ordinance and contract, in total disregard and violation of the Constitution and the laws of this state. A copy of said contract is herewith filed as a part hereof marked "Exhibit S. B." The specification referred to in said contract is also exhibited marked "Exhibit S. C." The specification thus made part of the ordinance and of the contract shows conclusively, if demonstration

were needed, that an electric apparatus is to be furnished to the city of *Parkersburg*, the city becoming the purchaser and the contract fixing the price.

The Pretended Contract, Which in Fact Creates an Indebtedness, is Falsely Denominated a Lease or Rental.

VI. Your orator charges, as shown by the papers herewith filed and upon the facts hereinafter stated, that under the guise of a lease with rent or hire for current expenses reserved by instalments, the object, purpose and effect of said contract is that the city becomes the purchaser of a part of a plant for electric lighting and becomes debtor for the amount of the purchase money, which is to be discharged by instalments running through a series of years, the city contracting to have the property placed immediately in its possession and control and to make payments thereon which are to be met and paid as an actual indebtedness in successive years as its instalments mature. The truth is that the actual basis of the unlawful transaction as known and stated to the members of the council before they passed said ordinance was, that the property was being sold at the sum of $25,000, to be paid for in instalments bearing interest from the completion and delivery of the apparatus at $5,000 per year, to be credited on the principal each year, in quarterly instalments for five years, and 6 per cent. interest also to be paid on the principal sum of $25,000. Thus it was, as shown by the contract, that the first instalment was made one-fourth of $6,500, which included $5,000 to be applied on the principal, together with the interest on $25,000, being $1,500. The first quarterly instalment of $1,625 mentioned in the contract, thus included $1,250 as a partial payment and $375 for the quarterly instalment of the $1,500 interest on $25,000.

Your orator calls especial attention to the provision that each quarterly instalment shall be $18.75 less than the preceding payment; and charges that the said sum of $18.75 is exactly the interest for three months on the $1,250 or principal of the debt which is fraudulently attempted to be concealed in

each instalment, and is falsely and fraudulently stated in the alleged contract to be paid each three months for the use of said apparatus, when in truth and in fact by the intent and purpose of the contract, each instalment pays $1,250 upon the purchase price fixed upon the apparatus, together with all interest that accrues up to the maturity of each instalment. And your orator charges the fact to be that the real effect of said contract and ordinance, and the intent and purpose of the parties to it, was that the T.-H. E. Company should sell and furnish to the city an apparatus for $25,000, to be paid for in quarterly instalments, each instalment to be for the sum of $1,250, together with the interest then due on that principal sum; and he charges further that the covinous character of the scheme and the fraudulent evasion of the law is shown by the cunning and indirection, which creates a present actual indebtedness for property purchased, to be paid for through a series of years, under the false pretense of a feigned appellation, and which deceitfully pretends that property purchasable at $1 is being honestly hired or leased at the rate of $6,500 per year.

Your orator charges that said contract and ordinance are null and void, as being in violation of the Constitution and laws of this state and against the charter of the city of *Parkersburg*: that the ordinance and contract are wholly unauthorized; that no election or vote of any kind of any qualified voters was ever had thereon, excepting only the unauthorized and void action of the members of the city council, who, as such council, have attempted to foist upon the city an indebtedness of $25,000 against the law, and your orator is advised, charges and submits that he is entitled to have said contract declared null and void, and all proceedings and acts thereunder forever perpetually enjoined.

No Provision Made for Direct Tax and no Vote had on the Question of Debt, and Constitution Violated.

VII. Your orator further shows that said ordinance and contract was in further violation of the Constitution (art. 8,

sec. 10), in that neither at the time of incurring said indebtedness nor at any other time before or since then, has the city or its council provided in any manner for the collection of a direct annual tax, to pay any part of said indebtedness, but he charges that in truth and in fact the council has contracted an indebtedness in the manner above set forth without a single question connected therewith having been submitted to a vote of the people, and without in any manner providing for the collection of a tax to pay any part thereof, and the city council has further distributed such indebtedness over a period of five years, which is beyond the term of official life of any council. By the charter of said city the term of the council which voted upon said alleged ordinance and contract expires the 20th day of April, 1891 (charter, sec. 5), and even the first instalment which could by possibility accrue would fall beyond the present term, and not one dollar has been raised or appropriated to meet it.

Your orator charges, as shown by a proclamation of the mayor of *Parkersburg*, hereunto filed, marked "S. No. 100," that the said city in *March, 1890*, was indebted within *$60,479.51* of five per cent. of taxable property therein. He charges that $50,000 of bonds mentioned in that proclamation were duly issued and sold by the city afterward, leaving a margin of only $10,479.51, and that the present fraudulent contract herein complained of creates a debt of $25,000 against said city, and after allowing all deductions and allowances, the said debt of $25,000 would exceed the city's constitutional limit of indebtedness by over $9,000, besides the amount of $7,800 required to be expended by the city for boiler foundation and house under said void and fraudulent scheme.

Your orator again charges that said ordinance and contract, by a studied perversion of language, fraudulently covers an actual purchase by the word "lease" and an actual indebtedness by other feigned devices, but he charges that both on the ground of fraud and of the unconstitutionality of said ordinance and contract the same are void and should be annulled;

and he further charges that the same were passed, procured and brought into being by an abuse of the powers vested in the council and its members and in violation and abuse of the trust imposed upon said council as the custodian and guardian of the funds and interests of the city of *Parkersburg.*

The Council has Misappropriated Funds, Entitling a Taxpayer to an Injunction by the Express Terms of the Charter.

VIII. Your orator further shows that, by sec. 34 of the city's charter [*here insert said section*].

Your orator shows that the same council which voted upon said contract, did, on the *10th* day of *November, 1890,* pretend to apportion a levy for the then current year among the several funds then ascertained and provided for, as shown by a copy from the records of said council herewith filed, marked "Exhibit S. D.," and made part hereof; that the total valuation of property assessed was $3,816,750; that the apportionment was upon the following basis, that is to say [*here insert the same*], which was and is the extreme limit of taxation allowed to the said city.

Your orator charges that of the departments of the city government intended by its charter to be separated, but which are included under the omnibus item of "Various Departments," come the fire department, the police department, the market house, street lighting, salaries and other like heads, but so it is that no such separation was made as contemplated by law, but on the percentages and basis of levy above stated the apportionment in money was as follows: [*Here insert the same.*]

Your orator further shows upon the figures appearing on the accounts and books of the city of *Parkersburg* that there is no fund from which the amounts incurred and pledged by the contract and ordinance aforesaid can be met or discharged, except that entitled "Expenses of the Various Departments," for which the amount levied was $14,503.65, and that the condition of that fund on *21st* day of *March, 1891,* when he caused the city's books to be examined, was, that there has been ex-

pended and chargeable to that fund the sum of $25,197.93, and that large amounts of money have since that date been paid by the city, which are chargeable to that fund, and thus further increase the excess of expenditures over amounts levied. Your orator charges that all excess of expenditure over amounts properly creditable to said fund, are a misappropriation from the other funds of the city. And so your orator charges that in violation of sec. 34 of the city charter there has been a misuse of the funds apportioned under the several heads which make a deficiency in the account "Various Departments," to which this present contract proposes at once to add over $8,000, for the substructure and building to receive the electric light plant, and to entail upon it a charge of over $3,000 per year for running expenses, in addition to the payment by instalments of the indebtedness of $25,000 for the electric plant, the details of such charges and expenditures on account of that fund being further shown below.

Your orator charges upon his information and belief shown as above stated in the records of the city, that there was not at the time of making of the contract between the city of *Parkersburg* and the T.-H. E. Company any money wherewith to pay the said sum of $25,000, and that the said sum of $25,000, if it had been paid in cash, would have furnished only a portion of the plant necessary for efficient service; that by the terms of said contract the city is required to [*here insert what the city is required to do under said contract and the aggregate cost thereof*].

Your orator further shows that by the terms of the contract with the T.-H. E. Company, the T.-H. E. Company has agreed with the city that it will commence the erection and construction of its plant within sixty days, and that the same shall be able to furnish light upon the streets of *Parkersburg* within ninety days thereafter. The basis and foundation of the site and building and the motor power is to be furnished by the city before the T.-H. E. Company can comply with the contract, and thus it is that the city has bound itself to furnish

property and appurtenances costing this very large sum, and to have the same ready as a constituent part of the plan within five months from the date of the contract, according to its true intent and purport, and there is no fund from which the city can pay for the articles and property that it has agreed to furnish, nor has any tax been levied for that purpose, nor has any such expenditure been authorized in any shape, form or way by the taxpayers or voters of the city, nor is there any fund on which the city can draw for the purpose of defraying any such expenses, except by a misappropriation and a misuse of funds in violation of sec. 34 of the charter.

Your orator further shows that after the plant is ready and complete, no light can be made except at the expense of the city of *Parkersburg,* and your orator knows from intimate acquaintance with the costs of such matters that it will cost not less than $3,500 per annum to pay the running expenses of said electric light plant, the fact being that the said council understood and intended that the lowest estimate at which it could be done was $3,180 per annum; and so it is that your orator believes and charges that the city of *Parkersburg,* having no money that it can appropriate to any purpose, has incurred an indebtedness of $25,000 unlawfully; has agreed to furnish property that will cost thousands of dollars additional as a constituent element of the plant under its control, and has agreed to pay the sum of $1,625 per quarter; and has further determined to expend over $3,000 per year for furnishing light and operating the plant, and all this without having apportioned one dollar to the purpose, without having any money wherewith to pay it, and in plain violation and contravention of the duty of its officers, and in breach of the trusts imposed upon them by law, and against the Constitution of this state and the charter of the city.

Circumstances Regarding the Action of the Council.

IX. Your orator further shows that he believes [*here are set forth matters of a local nature not necessary, ordinarily, to be inserted in a bill of this character*].

X. Your orator further sheweth unto Your Honor that [*here set forth the facts and circumstances showing the immediate threat, intention and purpose of carrying into effect the matters to which the bill relates whereby the illegal indebtedness will be created unless an injunction issues*].

Wherefore, and in consideration of the premises, and forasmuch as your orator is remediless save in a court of chancery where matters of this kind are properly cognizable and relievable, your orator prays that the city of *Parkersburg* and G. B. G., mayor of said city, R. J. M., J. G., P. B., E. O. H., C. T. C., H. B., R. W. and J. B. M., councilmen of the city of *Parkersburg*, and T.-H. E. Company, a corporation, be made parties defendant to this suit and required to answer this bill, and each allegation thereof, as particularly and specifically as though specially interrogated with regard to each allegation therein contained, and that said ordinance and contract may be decreed to be null and void, and that the court will award process and proper writ of injunction directed to the defendants, and to each of them, according to the prayer of the bill. And the further prayer of your orator is that the defendants, the city of *Parkersburg* and the mayor and council thereof, and each of them, be enjoined, inhibited and restrained from doing any act and from paying any money in furtherance of said ordinance passed on the *18th* day of *March, 1891*, or under the contract mentioned in that ordinance between the city of *Parkersburg* and the T.-H. E. Company, and from in any manner using, setting up or acting under said ordinance or contract, and that they further be enjoined, inhibited and restrained from paying out any money on account of said contract or ordinance, or from in any manner creating an indebtedness against the said city whereby the said city will become indebted either under said contract and ordinance or under any other agreement or transaction between the city and the said T.-H. E. Company, or any person in that behalf, without first submitting the question in regard thereto to a vote of the people, and providing for the levy and collection of a direct annual tax suf-

ficient to pay the full amount of said indebtedness as provided by law.

And that Your Honor will grant such other, further and general relief in the premises as in equity may be deemed right and just and as the nature of the case may require.

And as in duty bound, etc., your orator will ever pray.

B. M. A., B. D. S.,
Solicitor for the Plaintiff. By Counsel.[72]

[*Add the usual affidavit for the verification of an injunction bill.*]

No. 134.

§ 988. To restrain the collection of an illegal tax.

J. N. B. C. v. The Town of Philippi, a Corporation, and J. H. D.	In Chancery.

State of ———,
——— County, to-wit:

In the Circuit Court thereof.

To the Hon. J. T. H., Judge of the Third Judicial Circuit of West Virginia:

The bill of complaint of J. N. B. C. against the town of Philippi, a municipal corporation under the laws of said state,

[72] The foregoing form is taken from Spilman v. City of Parkersburg, 35 W. Va. 605, 14 S. E. 279, and fully illustrates the character and scope of a bill filed to enjoin the creation of an illegal indebtedness by a municipality. The different essential parts of the bill are separated by suitable headings which will enable the draftsman to see the main features of such a bill from a mere glance at the form. "In a bill, filed to restrain the collection of taxes for school purposes, in a certain township, the plaintiff must aver that he sues, not only on his own behalf, but also, on behalf of all others, similarly situated. Such averment is essential to a complete determination of all the rights affected by the suit." McClung v. Livesay, 7 W. Va. 329. See Hogg, Eq. Princ., § 257, where the subject as to injunctions to prevent the creation of illegal indebtedness by municipalities is considered.

and J. H. D., the sergeant and tax collector thereof, filed in the circuit court of ——— county, within said circuit:

The plaintiff complains and says that he is a citizen of ——— county, and a resident of the district of ——— in said county, where he has for over thirty years resided and been engaged, and is now engaged, in the mercantile business. During all of these years he has claimed his said residence in the said district, been assessed therein and voted therein without any question of any kind or character ever arising as to his right so to do or as to his said residence; that during all these said years up to and after the date of the assessments hereinafter set forth, he was the owner of a large and valuable farm, upon which was situated his residence, and he was the further owner of his store building and other lands in said district. In said store building was his stock of goods, the only one owned by him individually, and upon his said farm he has continuously, during these thirty years, maintained and kept such live stock as he was the owner of.

Plaintiff further says that the said county of ——— is divided into two assessment districts known, respectively, as the eastern and western districts, and that one W. B. C. was, during the last year, the legally qualified assessor of the western district, and one G. W. H. was the like assessor of the eastern district; that the district of ——— lies within the limits of the western district, and the district of P., including the said town of *Philippi,* lies within the limits of the said eastern district. Plaintiff charges that he has, as stated before, been assessed for taxation in the said district of ———, and was so assessed this year as of the first of *April* on all of his personal property, money, notes and bonds in said district of ——— by the said W. B. C., and in that connection he now here states that being called upon by the said W. B. C., assessor aforesaid, the said W. B. C. ascertained from plaintiff the personal property of plaintiff, and fixed the value thereof for taxation purposes, including notes, bonds, etc., to be *thirty-one thousand one hundred and five* dollars, by his own ascertainment, and informed

plaintiff and gave him a pencil memorandum of the amount of assessable property with which he was chargeable with taxes, but subsequently without the knowledge or consent of the plaintiff, the said C., of his own accord, and as plaintiff verily believes, actuated by no other spirit than that of ill will and a wanton and willful desire to oppress this plaintiff, increased said amount, as plaintiff charges, by no legal right or authority to the sum of *ninety-six thousand one hundred and five* dollars, and so charges him with such unlawful assessment of *ninety-six thousand one hundred and five* dollars on his assessment books of the said western district in said magisterial district set out; and further, as this plaintiff is informed and verily believes, by written letter directed the said G. W. H., assessor in the eastern district, to charge said C. upon his said book of said eastern district in the independent school district of *Philippi*, lying within the magisterial district of *Philippi*, with the sum of *thirty thousand* dollars, the amount of money, notes and bonds which he, the said C., had ascertained the said plaintiff by his original assessment to be chargeable with, and to that amount, to-wit, *thirty thousand* dollars, he was so assessed by the said H. in the independent district of *Philippi*.

Further complaining, plaintiff says that the said defendant, the town of *Philippi*, is situated within and comprises a portion of the said independent school district of *Philippi;* that said town of *Philippi* has appointed the defendant, J. H. D., both assessor and collector of the taxes for said corporation, a thing which plaintiff submits could not legally be done because of the incompatibility of the two offices, which vitiates, as plaintiff submits, the said D.'s right to hold the office of collector or to collect said taxes; that said D., as such town assessor, without any lawful authority, as plaintiff believes and charges and without any consent of any kind of plaintiff and against his strong protest, undertook and did assess this plaintiff with *one hundred thousand* dollars as consisting of notes, money, bonds, choses in action, etc., upon the assessment book of said town of *Philippi*, and the said town authorities, by and through its town

council, has undertaken to levy *one hundred* cents upon each *one hundred* dollars of the value ascertained by such pretended town assessment, and in addition a poll tax of *two* dollars, aggregating in all a tax of *one thousand and two* dollars, against plaintiff, and the said D., as town collector, has made out a pretended tax receipt for the said amount of *one thousand and two* dollars, and is demanding payment and seeking to enforce collection thereof from the plaintiff.

Plaintiff charges said assessment, made by said town of *Philippi*, to be wholly illegal and void, and that the whole of the said *one hundred thousand* dollars of notes, bonds, etc., if the same were properly assessable at all, which he denies, could only be assessed to him in the district of ———, where his legal and lawful residence is.

He further charges that said tax can not legally or lawfully be collected from him; that the levy made by the town council of said town was in plain violation of the law, and instead of being based upon the assessed valuation made by the assessor, as provided by law to govern all towns within this state of less than ten thousand inhabitants (and the town of *Philippi* is of that number), it was, as plaintiff charges and believes, levied upon an assessment illegally made by said town assessor under the directions of the mayor of the town.

The plaintiff further charges that the said property, whatever its amount may be, consisting of notes, bonds, choses in action, etc., was not within the corporation of said town of *Philippi*, and was not liable to be assessed therein, and the action of said town assessor in making said assessment and of said town council in laying said levy thereon, of said town collector in making out said tax receipts against plaintiff, were all acts *ultra vires* and void; but inasmuch as the said town collector insists upon collecting said tax receipts this plaintiff is informed that he has a right to come into this court of equity and have him and the said corporation enjoined and restrained perpetually from so collecting it and from thus exercising this illegal authority, and that to deny him relief in the premises

would be to his great wrong and injury, all of which is contrary to equity, etc.

In consideration whereof this plaintiff prays that said defendants may be made parties hereto and answer the same; that said defendants may be enjoined and restrained from the collection of said tax assessed as aforesaid until the matters herein contained may be inquired of, and upon a final hearing that the said assessments, the said levy and the said issuance of said tax receipt be held to be acts *ultra vires* and void, and that they be wholly set aside and said defendants be forever enjoined from the collection of said tax unlawfully assessed as aforesaid, and that the plaintiff have all other, further and general relief as to equity may seem meet.

W. T. I. and A. G. D., J. N. B. C.,
Solicitors for the Plaintiff. By Counsel.[73]

[*Add the usual affidavit for the verification of an injunction bill.*]

No. 135.

§ 989. To restrain and inhibit the extraction of oil or gas from the lands of the plaintiff.

[*After the usual caption, address and commencement.*]

The plaintiffs, S——— T———, M——— T———, M——— J——— W———, N——— W———, S——— J——— T———, E——— T———, J——— T———, and S——— T———, infant, are the owners in fee of a tract of land containing one hundred and two acres, more or less, situate in Ells-

[73] The foregoing form is taken from Crim v. Town of Philippi, 38 W. Va. 122, 18 S. E. 466. See Clarksburg Northern Railroad Co. v. Morris, 76 W. Va. 777, 86 S. E. 893; Ohio Fuel Oil Co. v. Price, 77 W. Va. 207, 87 S. E. 202.

One or more taxpayers of a county on behalf of himself or themselves and all other taxpayers of the county subject to the illegal tax complained of, may file their bill of injunction to prevent the collection of such tax, and it will lie on the ground that such injunction will avoid a multiplicity of suits. Williams v. County Court of Grant Co., 26 W. Va. 488, 53 Am. Rep. 94.

worth district, Tyler county, and state of West Virginia, and bounded and described as follows: [*Here describe the land.*] Plaintiffs aver that they were on the first day of March, 1896, in the full, peaceable and lawful possession of said land; that on said land a legal and valid lease for oil and gas was executed by the said S——— T——— in her own right, M——— T———, M——— J——— W———, S——— J——— T——— and the said S——— T———, as guardian of E——— T———, J——— T——— and S——— T———, to the plaintiffs, H——— W——— R——— and S——— C——— W———, who subsequently by deed conveyed the full, equal and undivided one-half interest in said lease to D——— H——— C———, and which lease so made is herewith filed as "Exhibit A," and made part of this bill.

Plaintiffs further say that said H——— W——— R———, S——— C——— W——— and D——— H——— C——— entered into an agreement with the plaintiffs, E——— H——— J———, J——— G——— J——— and R——— M——— J———, whereby in consideration of one undivided one-half interest in said lease said J———s would drill an oil or gas well upon said tract of land; that in pursuance of said agreement they located and drilled a well upon said premises which produced oil in paying quantities, and made the premises and adjoining property very valuable for oil and gas purposes; that adjoining said tract belonging to the said T——— heirs is another tract of two acres, more or less, known as the "A——— Lot," part of a tract or parcel of land known as the "J——— H——— S——— Tract," containing thirteen and one-half acres; that the said defendants, C——— M———, H——— R——— and L——— M——— G———, hold what purports to be a lease for oil and gas upon the said A——— tract of two acres; that by virtue of said lease they entered upon and proceeded to develop said two-acre lot for oil and gas purposes, and made a location thereon at which a well for oil and gas should be bored.

Plaintiffs say that while said location is pretended to have been made upon said two-acre tract, in truth and in fact it is

made upon the said T——— tract, and not upon the said A——— lot of two acres; that in making said location said defendants are trespassing upon the premises owned and controlled by and upon the rights and privileges of the plaintiffs; that the said defendants shortly after making the location aforesaid were notified that they had located the said well upon the said tract or parcel of land owned and controlled by the plaintiffs, and that defendants were and are trespassing thereon; that notwithstanding said notice, said defendants, contrary to law, and in violation of the rights of the plaintiffs, proceeded to erect the necessary wood rig, a portion of which is situated on the lands of the plaintiffs, and to drill at said location and upon plaintiffs' said land, a well for oil and gas; that frequently during the progress of said drilling additional notices have been served upon said defendants that they are drilling said well upon said T——— farm, and upon the premises owned and controlled by the plaintiffs, but that notwithstanding such repeated notices defendants have continued to prosecute the drilling of said well; that said well is drilled and located upon the premises of the plaintiffs as aforesaid without legal right and authority, and without the consent of plaintiffs, and if the drilling of said well should be completed it would be of great and irreparable injury to the plaintiffs; that defendants have been advised by their own surveyor and have admitted that said well is on the land and premises of the plaintiffs.

Plaintiffs further say that if the said well shall be completed and prove to be productive of oil or gas plaintiffs will be unable to operate it although on their own premises, for the reason that it is located so near the boundary of their premises that they would be unable to erect the necessary wood rig further to operate the said well, that the loss or damage by the escape or flow of the oil or gas could not be controlled or saved, and that the damage would thus be irreparable and incalculable.

Plaintiffs further say that the said defendants, each and all of them, are insolvent, and that any judgment at law against either or any of them could not be collected, and would be

wholly unavailing and, therefore, that these plaintiffs are without any adequate remedy at law to obtain relief as to the matters herein complained of.

Your orators therefore pray that the persons whose names appear as defendants in the caption of this bill be made parties defendant thereto; that the boundary line between said T——— farm and A——— lot may be ascertained, fixed and determined by a proper decree of this court; that your orators be decreed to be the owners in fee of the land upon which said well has been located by the defendants as hereinbefore set forth, and of all the oil or gas which can or may be obtained from said well; that the defendants be decreed to have no estate, right, title or interest whatsoever in or to said oil or gas, or any right whatsoever to the possession of said land or said well; that the said defendants, their agents and employes, be enjoined, inhibited and restrained from further trespassing upon said land of your orators, or from entering thereon for any purpose whatsoever, from taking any oil or gas from, out of or through said well, from selling or disposing of any oil obtained by them out of said well, and from setting up any claim, right or title of any kind to said land or said well, or the oil or gas heretofore obtained, or which may be hereafter obtained, therefrom; and grant unto your orators such other, further and general relief as to equity may seem meet, and as in duty bound they will ever pray, etc.

E——— H——— J———, J——— G——— J———,
R——— M——— J———, H——— W——— R———,
S——— C——— W———, D——— H——— C———,
S——— T———, M——— T———, M——— J———
W———, N——— W———, S——— J——— T———
and S——— T——— as guardian of E——— T———,
J——— T——— and S——— T———,
C——— F——— G———, By Counsel.[74]
Solicitor for the Plaintiffs.

[74] The above form is taken substantially from the bill filed in the case of Moore v. Jennings, 47 W. Va. 181, 34 S. E. 793. See also, in this connection, Steelsmith v. Fisher Oil Co., 47 W. Va. 391, 35 S. E. 15.

No. 136.

§ 990. To restrain the taking of private property for public use without compensation.

[*After the usual caption and commencement.*]

Your orator alleges that he is the owner in fee of two certain lots of land on M——— street in the town of C———, county of ———, and state of ———, upon which lots he has erected storehouses in which he is now doing business as a merchant, which lots were conveyed to him by X——— Y———, by deed bearing date on the ——— day of ———, 19—, and duly of record in Deed Book No. ———, at page ———, of the records in the office of the clerk of the county court of said county, an attested copy of which is herewith filed, marked "Exhibit A," and made part of this bill.

Your orator further shows that the said town of C———, by its officers, agents and employes, without the consent of your orator, and without having first condemned said lots in the manner provided by law, is now, to-wit, on the ——— day of ———, 19—, building, erecting and constructing on the south side of your orator's lots, but entirely on the lots themselves, on the north side of said M——— street, immediately west of one of said storehouses, in said town of C———, a brick pavement; that no part of said lots upon which the said town is constructing, and proposes to construct, said pavement has been dedicated to the public use, either for purposes of a street or for any other purpose; that said pavement, if permitted to be constructed, will entirely prevent your orator from passing into his said lots to reach his storehouses with his horses and wagons as he has heretofore been accustomed to do, and will greatly injure his business as a merchant, the effect whereof will be to deprive your orator of the substantial value, use and benefit of his said property without due process of law.

Your orator further alleges that the said town of C———, through its competent authorities, refuses to make a crossing for horses and wagons over the pavement if the same shall be

erected, so that the plaintiff could cross and recross as he has hitherto been accustomed to do.

Your orator therefore prays that the said town of C———, its officers, agents and employes, be enjoined and restrained from building, constructing and erecting said pavement on his said lots until the said town and its authorities have condemned said ground by due process of law for the purpose of constructing said pavement; that the proceedings to condemn the same be conducted in the manner prescribed by law; that a crossing for the passage of horses and wagons over said pavement in going to and leaving the premises of your orator may be constructed, and grant unto your orator such other, further and general relief as to equity may seem meet, and as in duty bound he will ever pray, etc. A——— B———,

J——— U——— M———, By Counsel.[75]

Solicitor for the Plaintiff.

No. 137.

§ 991. Against an executor by legatees and the administrator of a deceased legatee, for the payment of their legacies and shares of the residuary personal estate.

[*After the usual caption and commencement.*]

Humbly complaining show unto Your Honor, your orators and oratrix, H. K., Sr., administrator of the goods and chattels, rights and credits of F. K., deceased, H. K., Jr., and S. K., an infant under the age of twenty-one years, to-wit, about the age of twenty years, by the said H. K., Sr., her father and next

[75] The doctrine authorizing the form above given will be found in Boughner v. Town of Clarksburg, 15 W. Va. 394, from the bill in which case it is formulated; Mason City S. & M. Co. v. Town of Mason, 23 W. Va. 211; Spencer v. Pt. Pleasant & Ohio R. Co., 23 W. Va. 406; Yates v. Town of West Grafton, 33 W. Va. 507, 11 S. E. 8; Mason v. Harper's Ferry Bridge Co., 17 W. Va. 396; Pierpoint v. Town of Harrisville, 9 W. Va. 215; Wenger v. Fisher, 55 W. Va. 13, 46 S. E. 695.

friend, that [*here aver the appointment and qualification of the administrator, as in form No. 25*]; that J. R. being possessed of and well entitled unto a considerable personal estate, duly made and published his last will and testament in writing, and a codicil thereunto annexed, the said will bearing date on or about the ——— day of ———, 19—, and by his said will amongst other things gave and bequeathed unto your oratrix, S. K., the sum of $———, to be paid to her at the age of twenty-one years or day of her marriage, which should first happen. And said testator also gave and bequeathed unto your orator, H. K., Jr., the sum of $———, to be paid to him on his attaining his age of twenty-one years. And the said testator, after giving divers other legacies, gave and bequeathed unto R. B. (the defendant hereinafter named) and W. R. H., who departed this life in the lifetime of the said testator, the rest and residue of his estate and effects in trust to be equally divided between such children of his, the said testator's, niece. M. K., as should be living at the time of his deeease, and thereby appointed the said R. B. exeeutor thereof; as in and by the said will or the probate thereof, when produced to this honorable court, will fully and at large appear.

Your orators and oratrix further show unto Your Honor that the said J. R. departed this life on or about ———, without having revoked or altered said will save by the said codieil, and without having revoked or altered the said codieil or any part thereof; whereupon the said R. B., the exeeutor in the said will named, duly proved the same in the proper court, and undertook the executorship thereof, and possessed himself of the personal estate and effeets of the said testator to a very considerable amount, and more than suffieient to discharge his just debts, funeral expenses and legacies.

Your orators and oratrix further show unto Your Honor that the said F. K., in the said testator's will named, and your orator and oratrix, H. K., Jr., and S. K., were the only children of the said M. K. in the said will named who were living at the time of the death of the said testator; and your orator, H. K.,

Jr., became entitled to have and receive his said legacy of $——— so bequeathed to him as aforesaid, and also his third part or share of the residue of the personal estate and effects of the said testator after payment of all his just debts, legacies and funeral expenses; and your oratrix, S. K., is entitled to have her legacy of $———, and also her third part or share of the said residue secured for her benefit until she shall attain her age of twenty-one years or day of marriage; and your orator, H. K., Sr., is entitled as such administrator of the said F. K., as aforesaid, to have and receive the remaining third part or share of the said residue. And your orators and oratrix further show unto Your Honor that the said F. K. departed this life on or about ———, intestate, and that since his death your orator, the said H. K., Sr., has obtained letters of administration of the personal estate and effects of the said F. K. to be granted to him by the court, as aforesaid.

Your orators and oratrix further show unto Your Honor that your orator, H. K., Jr., attained the age of twenty-one years on or about the ——— day of ———, 19—, and your orators and oratrix being so entitled as aforesaid, your orators have made frequent applications to the said R. B. to pay the said legacy of $——— and the said two-third shares of the said residue; and your oratrix hath also applied to him, the said R. B., to lay out and invest her said legacy of $——— and her third share of the said residue upon some proper security for her benefit until she shall attain her age of twenty-one years or day of marriage, with which just and reasonable requests your orators and oratrix well hoped that the said defendant would have complied as in justice and equity he ought to have done. But now so it is the said R. B. pretends that the said testator's personal estate was very small and inconsiderable and not nearly sufficient to pay and satisfy his just debts and funeral expenses. Whereas your orators and oratrix expressly charge that the personal estate and effects of the said testator were much more than sufficient to discharge the said testator's just debts and funeral expenses and legacies; and so it would appear

if the said defendant would set forth a full, true and particular account of all and every the personal estate and effects of the said testator come to his hands or use, and also a full, true and particular account of the manner in which he hath disposed of or applied the same, but which the said defendant refuses to do.

Your orators and oratrix therefore pray that the said R. B. be made a defendant to this bill and he required to answer the same; that an account may be taken of the personal estate and effects of the said testator come to the hands of the said defendant or of any person or persons by his order or for his use, and also of the said testator's funeral expenses, debts and legacies; that the same may be applied in a due course of administration; that the said defendant may be decreed to pay to your orator, H. K., Jr., his said legacy of $———; that the clear residue of the said testator's personal estate and effects may be ascertained and that such share thereof as shall appear to belong and be due to your orators, respectively, may be paid to them, respectively, and that your oratrix's said legacy of $———, and also such share of the said residue as she shall appear to be entitled to may be secured for her benefit; and that for those purposes all proper directions may be given, and grant unto your orators and oratrix such other, further and general relief as to equity may seem meet. A——— B———,

M. N., By Counsel.[76]

Solicitor for the Plaintiff.

No. 138.

§ 992. To restrain and inhibit laborers and members of labor organizations from molesting or injuring the plaintiff in the conduct of his business.

[*After the proper caption and commencement.*]

I. Your orator is a mining corporation, duly created and organized under the laws of the state of West Virginia; its prin-

[76] The foregoing form is taken from The Equity Draftsman, p. 217.

cipal office and place of business is located in the county of ——— and the state aforesaid; and it is engaged in mining coal and the operation of what is called and known as a coal plant, in which business and industry it gives employment to about five hundred men [*or whatever the number may be*], miners, drivers, haulers and laborers. Your orator produces a large amount of coal, to-wit, about a thousand tons per day, for which it finds market and sale in many different states of the Union, in the eastern, western and northern portions thereof. In the construction and erection of said plant and in its maintenance and repair your orator has expended a large sum of money, to-wit, the sum of two hundred and fifty thousand dollars, and it is engaged in mining and producing coal from a certain tract of coal land containing about one thousand acres, situate in said county of ———, under and by virtue of a lease, and in said lease and by virtue of the terms thereof your orator is required to pay a royalty of ——— dollars per annum, whether it produces and operates its said mine or not; and should your orator not operate or be prevented from operating said mine, the payment of said royalty would be an actual loss to it.

II. Your orator avers that it is under divers contracts to furnish large quantities of coal for the markets aforesaid, which by the terms thereof must be carried out and fulfilled and which your orator can not do, if from any cause your orator does not operate said mines; that your orator has many miners, drivers, haulers and laborers who are willing to work for it, and that it will be able to fulfill its said contracts and thus profitably conduct its business if not delayed in the operation of its legitimate business on account of the wrongs hereinafter complained of.

III. Your orator further says that the operation of its said mines has been practically suspended, and that its miners and other employes who have heretofore been working for your orator under contract in the matter of mining and producing coal for the market as aforesaid, and who have been receiving

wages and pay from your orator for their labor, with which they are satisfied, have been idle for more than two weeks past, and that the cause of their idleness and failure to mine coal and to do and perform other labor for your orator arises solely and directly from the unlawful acts hereinafter mentioned of the defendants, their agents, confederates and associates; and that the said miners and other laborers who have heretofore been engaged in mining and performing other labor for your orator, are now willing, ready and anxious to resume their labors for your orator whenever the said defendants, their agents, confederates and associates are restrained and inhibited from doing and performing the unlawful acts hereinafter complained of.

IV. Your orator now alleges that there has been for the ——— last past what is known and called a "miners' strike,"[77]

[77] STRIKES.—The allegation in the form given above in a bill of this character that a "strike" was directed, is only made for the purpose of showing why it is that the acts of the defendants thereinafter alleged and set forth were committed, inasmuch as laboring men and employes of every kind and character have a right to enter upon a "strike," for the purpose of promoting their interests in any legitimate manner. This principle is supported by the decisions both of the federal and state courts. Arthur v. Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; Longshore Printing Co. v. Howell, 26 Or. 527, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A., pp. 470, 471; Eddy on Combinations, §§ 521, 527.

In the case of Longshore Printing Co. v. Howell, *supra*, the court, in the course of its opinion, discussing the subject of "strikes," says: "If one person can lawfully quit the service of his employer because of the rate of wages paid or the employment of objectional persons, can not several or many persons, first agreeing among themselves to the same purpose, likewise lawfully quit? Conspiracy at common law was a combination between two or more persons to do an unlawful thing, or to do a lawful thing by unlawful means. Where not under special contract for a definite time, a simultaneous severance of the relations between employer and employes at the instance of the employes, and where there was no preconcerted action of such employes, was never considered unlawful. Coming to the means employed, it is not unlawful for several or many persons to agree between themselves to quit their employer. As we have seen, at one time it was held to be an unlawful conspiracy for laborers to combine for the purpose of quitting simultaneously with the ultimate purpose of raising their wages, or inducing their employer

in this state; that said strike was and is directed by an organization known as and called the United Mine Workers of Amer-

to confine his employment to certain kinds of labor, or the like; but this is not now the law, the principle underlying which having long since been discarded as inconsistent with liberty and the spirit of our free institutions. After workmen have thus combined, it is still not unlawful for them, by the use of fair means, to communicate the reasons for their design, and to signify their intention of quitting to their employer. 24 Am. and Eng. Enc. Law, 123; Manufacturing Co. v. Hollis, 54 Minn. 233, 234, 55 N. W. 1119; Walshy v. Anley, 7 Jur. (N. S.) 466; People v. Kostka, 4 N. Y. Cr. R. 434; People v. Wilzig, *idem*, 417; Rogers v. Evarts (Sup.), 17 N. Y. Supp. 268. Within these limits, a perfectly legitimate strike may be inaugurated and maintained, the object being to better the condition of workmen. Such an object is not only legitimate and lawful, but it is just and praiseworthy. It was not wrongful, therefore, for the Multnomah Typographical Union to adopt a rule limiting the number of apprentices, and seek by fair means to enforce the observance thereof, so that its purpose in that respect was lawful. The claim that a monopoly is thus being promoted surely constitutes no grounds for equitable interference by injunction. This whole controversy has arisen because of the existence of the rule referred to and the efforts of the union to require its observance at the hands of the plaintiff. When, however, unlawful means are used to uphold or maintain a strike, or if the purposes for which it is maintained are unlawful, then it follows as a matter of course that the strike is in itself unlawful."

Mr. Eddy, in his treatise on Combinations, discussing the subject of labor strikes, says: "Employees have the same right to combine together for the lawful advancement of their interests that employers have, and, providing there is no continuing contract of employment, and no violation of any duty arising out of the nature and character of the service, employees acting as a combination have the same right to leave as a body that the employer has to dismiss, providing always that the action of the combination is for the purpose of advancing the legitimate interests of its members, and not for the purpose of oppressing or injuring others." Eddy on Combinations, § 522.

This learned author, further considering this subject, says: "As commonly understood, the term 'strike' means the quitting of work by employees in a body in accordance with a prearranged plan, the object being to coerce the employer into granting some demand by inflicting upon him the greatest possible damage. But before a strike can be pronounced illegal the object in view as well as the means to be employed must be taken into consideration. If the object be simply to advance the interests of the employees without injuring or oppressing some third person, then the strike is not illegal, even though some inconvenience, loss or damage result to the employer. For instance, workmen may combine to-

ica; that in pursuance of said strike and its promotion, there

gether to secure an advance of wages, shorter hours, or some other legitimate advantage, and they may consult with their employers, and if they fail to agree they may notify their employers that they will leave the work in a body; and even though their quitting may leave the employer for the time being without any employees, and thereby occasion him great loss and inconvenience, still the action of the employees can not be condemned as illegal unless they violate some continuing contract or abandon their employment under such circumstances as to wantonly and maliciously inflict great injury to property or threaten loss of life. And in this connection it may be said that a combination comes dangerously near being a civil conspiracy if, in agreeing upon a strike and actually striking, it chooses an hour when the condition of the work in hand is such that the abandonment of the work is equivalent to an actual and wilful destruction of the property. There is little distinction between the wanton or malicious destruction of property and the abandonment of an occupation at a moment when the employees know that great and irreparable loss must occur to the work in hand by reason of lack of attention. A combination which chooses that moment for striking which will occasion the greatest destruction of property by reason of lack of attention amounts to a civil conspiracy. Such means are not the legitimate pursuit of a lawful end. There is a very great difference between striking with the immediate object of injuring and destroying property that needs for a time immediate attention, and striking with simply the object of attaining a legitimate end by inflicting upon the employer the inconvenience and loss which are commonly incidental to the unexpected desertion of employees." *Idem*, § 523.

But the same author, further considering the subject, says: "A combination to induce employees who are not dissatisfied with the terms of their employment to strike, for the purpose of inflicting injury and damage upon the employer, is illegal, and such malicious and illegal interference with the employer's business is actionable.

"Workmen may combine for the purpose of peaceably and without intimidation persuading their fellow-workmen to strike, in order to obtain an advance in wages, and they may lawfully pay the expenses of those who strike; and in this connection they may post up in their assembling room a list of persons who have contributed to the fund for the support of those who have struck." *Idem*, § 525.

" The tendency of modern thought and judicial decisions is the enlargement of the right of combination, whether of capital or labor. 'Irrespective of any statute, I think the law now permits workmen, at least within a limited territory, to combine together, and by peaceable means to seek any legitimate advantage in their trade. The increase of wages is such an advantage. The right to combine involves of necessity the right to persuade all co-laborers to join the combination.

the said defendants are permitted to continue their threats aforesaid, and the display of banners and the utterance of inflammatory speeches, which they are now making in the presence of your orator's said employes in and about your orator's said coal plant.

VI. Your orator further says that, by reason of the acts and doings of the said defendants hereinbefore mentioned and described, a large number of your orator's employes have already quit mining and laboring for your orator, and the rest of your orator's said employes will also cease to mine coal and labor for your orator in and about the said coal plant, and thereby cause your orator's said coal plant to become idle and deteriorate in value to a very great extent, and also render it impossible for your orator to fill its said contracts for the sale of its output of coal as aforesaid, if the said defendants are permitted to continue in their unlawful acts aforesaid.

workmen is not such coercion or threat as renders their combination a conspiracy." Cote v. Murphy, 159 Pa. St. 420, 23 L. R. A. 135, 39 Am. St. Rep. 686, 28 Atl. 190.

"Combination, whether of laborers or capitalists, may or may not be a conspiracy—it is a confederating together for certain purposes; whether it is legal or illegal depends upon its purposes and not upon its *personnel*. If the object of the combination is to do that which is unlawful, oppressive or immoral, it is an illegal combination, no matter who composes it; if the object is to do that which is not unlawful, not oppressive, not immoral, either as a means or an end, then the combination is not illegal no matter who compose it." Eddy on Combinations, § 380.

"Conspiracy is the combination of two or more persons to do (*a*) something that is unlawful, oppressive or immoral; or (*b*) something that is not unlawful, oppressive or immoral by unlawful, oppressive or immoral means; (*c*) something that is unlawful, oppressive or immoral by unlawful, oppressive or immoral means.

"The broad definition of conspiracy is made necessary in view of numerous decisions wherein combinations have been held illegal, neither the object nor the means of which were contrary to law, but were simply oppressive." Eddy on Combinations, § 171.

The authorities are pretty well agreed that if a combination or confederation becomes a conspiracy to injure the public or individuals, though such conspiracy may be indictable under the statute or at common law, still, if two or more persons conspire and combine to injure or destroy another's business, and it is clearly made to appear

quit work, and by means of which they have thoroughly and completely disturbed all your orator's said employes; and that by threats of personal injury made to and in the hearing of your orator's employes, by the display of banners with devices made thereon, thereby conveying the idea and impression to your orator's said employes that their personal liberty and safety depend upon their quitting their work at your orator's said plant; and by inflammatory speeches made to and in the presence of your orator's said employes, they, the said defendants, have so coereed, intimidated and influenced the said employes that they, said employes, are about to quit your orator's employment; and that if the said defendants are permitted to continue their said threats, their display of banners and other demonstrations hereinbefore specified, your orator's said employes will cease to work for it, so that your orator's said coal plant can not be operated.

V. Your orator is advised and so alleges that its said employes now at work at, in and about your orator's said coal plant will be intimidated [79] and, in fact, coereed, to quit mining coal and the performance of all other labor for your orator if

[79] CONSPIRACY.—The term "conspiracy" necessarily implies combination, confederation or co-operation of two or more persons, to do an act. A combination is simply a co-operation of two or more persons to achieve a given result. Eddy on Combinations, § 167. A legal combination is a co-operation of two or more persons to do that which is neither contrary to law nor public policy. *Idem*, § 168. Thus an injunction will not issue to enjoin defendants from continuing a conspiracy or combination, not to employ complainants. Worthington v. Waring, 157 Mass. 421, 20 L. R. A. 342, 34 Am. St. Rep. 294, 32 N. E. 744. So "when workmen engaged in building trades lawfully combine to artificially advance wages by reducing the hours of labor, and associations of employers in such trades combine and agree not to sell materials to contractors who concede to the demands of the workmen, and to induce other dealers by all lawful means not to furnish such materials, such associations are not liable in damages for conspiracy to one who aids the striking workmen by selling materials to them and to other contractors, and who, by reason of the combination of such associations, is not able to procure all the materials he can dispose of. The fact that such associations inform dealers that they will not buy from them if they furnish materials to any one who is aiding such

is a confederacy, combination [78] and association of men organized to that end, and that nearly all of the said defendants named in your orator's said bill are among the men so organized; that the said defendants have gone among the coal miners and other employes engaged in mining coal and laboring in and about your orator's said plant, for the sole purpose of inducing and persuading your orator's coal miners and other laborers to

This right to persuade co-laborers involves the right to persuade new employees to join the combination. This is but a corollary of the right of combination.'

"There may be, however, cases in which persuasion and entreaty are not lawful instruments to effect the purposes of a strike. Persuasion and entreaty may be used in such a manner and with such persistency and under such conditions as to constitute intimidation. Their use then becomes a violation of law." *Idem*, § 526.

"Owing to the fact that so many strikes are accompanied by acts of lawlessness on the part of the striking employees, who seek to prevent other workmen from taking their places, the strike as a means to obtain a legitimate end has fallen into no little disrepute, and even courts have come to consider that the lawlessness following a strike is in some manner one of its necessary incidents. Such is not the case. The determination to strike unless certain demands are granted is one thing, while the prevention of other workmen from taking the places of the strikers is quite another thing, and the one has no necessary relation to the other." *Idem*, § 527.

[78] INTIMIDATION.—Whatever may have been the inclination and opinion of the courts in the earlier history of strikes, it is very well settled that they are now lawful institutions, in which the laboring men may freely take part and resort to all lawful means and methods to promote their objects and purposes. But these agencies for the upbuilding of the material and social welfare of the wage-earner must not become the agencies of wrong or injury to others. Hence it has become important to determine what the laboring man may do in the prosecution of the strike. While he may use argument and persuasion even with the employer and the employed to bring about the attainment of the objects of a strike, it is pretty well settled that associations of labor or its combinations in the form of a strike can not resort to intimidation to reach their ends.

Therefore, all persons who by intimidation or threats of violence attempt to coerce employes or workmen to leave their work and join a strike may be inhibited and restrained from so doing, by the process of injunction. Hamilton Brown Shoe Co. v. Saxey, 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622; O'Neil v. Behanna, 182 Pa. St. 236, 38 L. R. A. 382, 61 Am. St. Rep. 702, 37 Atl. 843; Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307.

VII. Your orator is informed and believes and so alleges that the said defendants are insolvent and wholly unable to respond in damages on account of the injuries already done to your orator's said business, as aforesaid, and that your orator will be irreparably injured if the said defendants are permitted to engage in the acts aforesaid, and in which they are now engaged.

VIII. Your orator is advised, and so alleges, that there are other persons associated with said defendants, whose names are unknown to your orator, and are in federation with said defendants, for the purpose of aiding and promoting the said defendants in their acts aforesaid, to intimidate and thereby, in fact, cause and coerce all of your orator's said laborers and employes to cease their work of mining as aforesaid.

IX. Your orator is informed and believes, and so alleges, that the said defendants are engaged in the business and occupation

that the injury is threatened and imminent, and will become irreparable to the plaintiff, an injunction will lie to restrain the conspirators. Longshore Printing Co. v. Howell, *supra*.

"Discharged union workmen will be restrained by injunction from gathering about their former employer's place of business, and from following to and from their work nonunion workmen subsequently employed by him, and from gathering about the boarding house of such workmen, or in any manner interfering with them by means of threats, menaces, intimidation, ridicule, or annoyance, on account of their working for such employer." Murdock v. Walker, 152 Pa. St. 595, 34 Am. St. Rep. 678, 25 Atl. 492.

"A display of force by strikers against laborers desiring to work, such as surrounding them, calling them opprobrious names, and in a hostile and vicious manner urging them not to go to work, is intimidation, though no force is actually used, and as such is as unlawful as violence itself. Such acts may be restrained by injunction and the actors held liable to the employer for all damages resulting from their acts." O'Neil v. Behanna, 182 Pa. St. —, 61 Am. St. Rep. 702, 37 Atl. 843, 38 L. R. A. 382.

"Persons may be prevented by injunction from attempting, by intimidation and threats of violence, to coerce employees to leave their work and join a strike. They may also be restrained from assembling for that purpose in the vicinity of the place where such employees work." Hamilton Brown Shoe Co. v. Saxey, *supra*.

"Devices to prevent persons from entering into or continuing in the employment of another, as by threats, intimidation, display of banners, and the like, are illegal, both at common law and by the statutes of Massachusetts. Injunc-

of creating agitations and disturbances among the different coal miners of this state, and are now engaged in the work of endeavoring to organize employes in your orator's employment, so as to form a conspiracy composed of the said defendants and certain of your orator's employes [*here name them, and if the names are not known so state*] and wrongfully and illegally, that is, by threats of personal violence to them [*or whatever method is employed*], to cause your orator's other coal miners and employes to quit their said employment in and about your orator's plant, and that if the defendants are not inhibited and restrained therefrom by the process of injunction, the said defendants will cause the said conspiracy to be formed, and all the other of your orator's said employes to cease their said em-

tion will issue to prevent the making and carrying of banners in front of complainant's place of business for the purposes of preventing workmen from entering into or continuing in his employ." Sherry v. Perkins, *supra*.

"According to the principles of the common law, a conspiracy upon the part of two or more persons, with the intent, by their combined power, to wrong others or to prejudice the rights of the public, is in itself illegal, although nothing be actually done in execution of such conspiracy. So, a combination or conspiracy to procure an employee or body of employees to quit the service in violation of the contract of service would be unlawful, and in a proper case might be enjoined if the injury threatened would be irremediable at law." Arthur v. Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414.

"An injunction will be granted to restrain labor unions and members thereof from entering upon complainant's mines, or interfering with the working thereof, or by force, threats or intimidation preventing complainant's employees from working the mines, where the threatened acts are such that their frequent occurrence may be expected, and defendants are insolvent." Cœur d'Alene Consolidated and Mining Co. v. Miners' Union of Wardner, 51 Fed. 260, 19 L. R. A. 382.

"The rule that a trespass can not be enjoined unless on realty, and where the damage is irreparable, and after the right or title involved has been established at law, does not apply where an injunction is sought to restrain labor unions and members thereof from entering upon complainant's mines, or interfering with the working thereof, or by force, threats or intimidation preventing complainant's employees from working the mines, as no title to realty is involved, and the acts complained of are not a direct trespass to realty but only indirectly affect the enjoyment of property and other rights." Cœur d'Alene Consolidated and Mining Co. v. Miners' Union of Wardner, *supra*.

ployment and quit their work, and thereby entail upon your orator irreparable injury and damage.

X. Your orator further alleges that under the leadership, control and management of said defendants there are large bodies of men, consisting of [*here name the number of men approximately, and if exactly known so state*], who congregate near your orator's said coal plant and premises in very close proximity thereto, and to your orator's employes, who are now at work for your orator, and in their presence are making inflammatory speeches, using such language therein as is calculated and designed to inspire the said employes of your orator with fear of personal injury unless they quit your orator's employment; that said defendants have threatened to march with said large bodies of men hereinbefore designated through and over your orator's premises, which, your orator is informed and believes, and so charges, is done for the purpose of intimidating, frightening and coercing the men who are now engaged at work as aforesaid; and that unless the said defendants, their agents and confederates, are inhibited from leading and taking said bodies of men through and over your orator's said premises, they will lead said bodies of men over your orator's said premises for the purposes aforesaid, and through this agency and by means thereof will intimidate your orator's said coal miners and other employes, and thereby coeree said coal miners and other employes to quit their labor and employment aforesaid, to the great detriment, damage and irreparable injury of your orator.

XI. Your orator here alleges that the said defendants, their associates, agents and confederates, as your orator is informed and so charges, have made violent threats of personal injury against the employes of your orator, should they continue in your orator's employment; that such threats have been made to the extent that your orator's employes as aforesaid would be "killed" and "riddled with bullets" should they continue in your orator's employment; and that by the said threats and the means aforesaid, the said defendants or some of them, their

associates and confederates, are now about to cause your orator's employes to cease their work as aforesaid.

XII. Your orator therefore prays that the said defendants hereinbefore named, and all other persons confederating and combining with them for the illegal purposes hereinbefore specified, may be inhibited and enjoined from in any manner interfering with your orator's employes now in its employment, or any who may hereafter desire to work and labor for your orator, and from in any manner interfering with any person who shall apply to your orator for employment, by the use of threats of personal violence, or by the display of banners in any manner intended to intimidate your orator's employes, or by any other manner whatsoever, which may be calculated to terrorize or alarm the employes of your orator, in any manner or form whatsoever; that the said defendants and their confederates, and any one else combining with them for the illegal purposes aforesaid, be enjoined, restrained and inhibited from enticing or causing, by the means and agencies hereinbefore mentioned, any of the employes of your orator to quit and abandon your orator's work; that the said defendants, their confederates and associates, may be enjoined from congregating on or about the premises of your orator, in the manner and for the purposes hereinbefore specified, and that the said defendants, their confederates and associates, be inhibited and enjoined from leading or conducting any body or bodies of men on, to or near the premises of your orator, for the purpose of enticing or causing your orator's employes to quit work for your orator in the manner and by the means hereinbefore specified, or to in any way interfere with your orator's employes by the use of threats or any method of intimidation or coercion, and from in any way interfering with the business of your orator, as hereinbefore set forth in your orator's bill; that the said defendants, their confederates and associates, may be enjoined, restrained and inhibited from endeavoring to procure or entice your orator's said employes to abandon their work in its mines and upon its premises, by the use of threats and offers of personal

violence of any kind or charaeter, as hereinbefore set forth; and that the said defendants, their confederates and associates, may be enjoined and inhibited from in any manner unlawfully interfering with your orator's employes in passing to and from their work in and on or near your orator's premises, as they must do from time to time and from day to day in the proseeution of their said work.

And grant unto your orator sueh other, further and general relief as to equity may seem meet, and as in duty bound, your orator will ever pray, ete.

M——— C——— Company,
By Counsel.[80]

C——— W——— D———,
Solicitor for the Plaintiff.

[*Here append the proper affidavit for the verification of an injunction bill.*]

[80] We here append the following form of a bill for injunction to restrain laborers from displaying banners in front of plaintiff's business to his detriment and injury, taken from the record in the case of Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689:

First. And your complainant says that he is and has been for a great many years in the business of manufacturing boots and shoes in Lynn in our county of Essex, and as such manufacturer he employs a great many operatives who are engaged by him in the manufacture of said boots and shoes in the different branches thereof; that he carries on, and has carried on, said business on Monroe Street in said Lynn, in a factory which is his property; that heretofore, to-wit, on the first day of January, A. D. 1887, for the benefit of the operatives in his employ as aforesaid, he admitted them to a certain share of the profits of said business, by permitting them to invest in said business such sums of money as they might individually desire to invest in said business, and that they were to receive thereon a certain portion of the profits in proportion to the amount of money that they had invested in said business, and in addition to wages paid them for labor in said business; that said operatives were in no way responsible for any of the losses met in said business, if any, and were in no way liable for any liability of said business, but were simply to receive said per cent. of the profits from your complainant; that said operatives, in the different branches of labor in the manufacture of boots and shoes for the complainant as aforesaid, were to fix the prices which were to be paid in the different branches, and the complainant upon his part agreed to pay such prices; and that thereupon a great many of his said employes entered into said arrangement with him, and the prices for

No. 139.

§ 993. Bill of interpleader.

[*After the usual caption and address.*]

Your orator, A. B., respectfully represents to Your Honor that on the ——— day of ———, 19—, your orator purchased of one C. D., one of the defendants hereinafter named, two horses, for which he promised to pay the said C. D. the sum of ——— dollars, and gave the said C. D. his promissory note therefor, payable to the said C. D. ——— after date; that at the time of such purchase the said C. D. represented, and still insists, that he was the owner of said property, and had good right to sell the same to your orator, and to accept the said note therefor.

the making of the different parts of the work were fixed and agreed upon among themselves by said operatives, and by your complainant, and your complainant continued to carry on his said business without any trouble or annoyance from any person or persons under said arrangement.

Second. And your complainant further shows that there is a certain asociation in said Lynn, called the Lasters' Protective Union, which is a voluntary association and composed of persons who work upon one branch of the boot and shoe business, to-wit, in lasting said boots and shoes, and that said defendant, Charles E. Perkins, is president of the said voluntary association, and the said Charles H. Leach is secretary of said voluntary association.

Third. And your complainant further shows that on the fifth day of January, 1887, the defendant Leach, acting for himself and the defendant Perkins, called upon your complainant with reference to the prices for labor that he was paying and was going to pay his lasters, and your complainant then and there stated to said Leach that he had nothing to do with the prices; that the prices were to be fixed by the men engaged in that branch of the business, and that he should pay whatever prices should be agreed upon; and the defendant Leach thereupon left your complainant, and from said time until the eighth day of January there was no trouble between your complainant and his employes who were lasting in his said factory; that on the eighth day of January certain of the lasters in his employ, with the concurrence, and in fact at the instigation of the said defendants and other members of said association not known to your complainant, gave notice of their intention to leave the employ of your complainant, that they were compelled to do so by reason of statements made to them by the said defend-

And your orator further represents that afterwards, on the ——— day of ———, 19—, one E. F., a defendant hereinafter named, made known and claimed, and still insists and claims, that he, the said E. F., was at the time of said sale the real owner of the said property, and that the said C. D. was not the owner thereof as he pretended to your orator, but was merely the agent for the said E. F. in making the said sale to your orator; that the said C. D. had no authority to take said note in his own name, and that the said sum of ——— dollars was due and payable to him, the said E. F., and not to the said C. D.; and the said E. F. then and there notified your orator in writing not to pay the amount of said purchase money to the said C. D.

ants and other members of the association as aforesaid, and that they did not dare to work for him on account of said Perkins, Leach and other members of the association; and thereupon said employes who were engaged at said time in the work of lasting shoes for your complainant, left his employ.

Fourth. And your complainant further shows that there were at that time, in fact, many persons competent and willing to take situations vacated by the employes who had so left your complainant's employ, but, in order to prevent and intimidate such persons from entering into engagement with your complainant for carrying on his said business, and to prevent and intimidate the employes who had quitted your complainant's employ from re-engaging themselves, the defendants, with the assent and concurrence of the members for the time being of said association, and out of moneys contributed by the association for that purpose, on said eighth day of January published and caused to be carried in front of your complainant's factory by a boy hired by the defendants and paid from the moneys of the said association, a certain placard bearing the following inscription: "Lasters are requested to keep away from P. P. Sherry. Per order L. P. U."

Fifth. And your complainant says that in consequence of said banner appearing in front of his factory, large crowds of people were gathered together whenever the men in his employ, and who were engaged in the business of lasting shoes, left their work; and among said crowds were many members of said association whose names are unknown to your complainant; and that said crowds being so gathered, and when his men, in his employ, as aforesaid, left his factory to return to their homes, they, said men, were set upon, beaten and injured, and threatened with great bodily injury and harm, if they should continue in the employ of your complainant; and

Your orator further represents that the said E. F. has commenced an action at law against your orator, in the ——— court of the county of ———, in the state of ———, to recover the purchase money due on said property, and that the said C. D. is now threatening to bring suit against your orator on the said promissory note.

many were compelled by said members of said association to go to the hall then and there occupied by said association and were then and there threatened by bodily injury by said defendants Perkins and Leach, and other members of said association, if they continued in the employ of your complainant; and the said Leach, as your complainant is informed and believes, acting for himself and as secretary of said association, with two other members of said association, whose names are unknown to your complainant, on the twenty-sixth day of said January, called upon one Hamilton Wright, who was, then and there, in the employ of your complainant, and engaged in lasting shoes in said employ, and threatened the said Wright with bodily injury and harm if he continued to remain in the employ of said complainant, and by threats and intimidations endeavored to compel him to leave the employ of your complainant and to leave said city, and the said Leach, as your complainant is informed and believes and so avers, acting for himself and in behalf of the said association, and with divers other members of said association; who are unknown to your complainant, on the thirty-first day of January endeavored by threats and intimidations to compel one Doyle, who was, then and there, in the employ of your complainant as a laster, to leave said employ, threatening his life if he did not do so; and the said defendants, Perkins and Leach, and other members of said association, who are unknown to your complainant, on divers other days and times between the eighth day of January and the filing of this bill of complaint, have threatened bodily harm and injury to divers other men in the employ of your complainant, or who were willing to enter into the employ of your complainant, and by force and intimidation have endeavored to prevent your complainant from securing men competent and willing to work as lasters in his said factory.

Sixth. And your complainant further says that, on the eleventh day of February, one Jeremiah Meirs, who was, then and there, employed by your complainant as a laster, was followed by persons instigated by the acts of the defendants and other members of the association, and was beaten, injured and confined to his house as the result of the injuries received, as aforesaid, and is afraid to work again for your complainant, although he is anxious and willing to do so, on account of the acts of said defendants and other members of said association; and on February twenty-third the said Leach, as your complainant is informed and believes and so avers, threatened one Barrett, who was then in the em-

Your orator further represents that he has always been willing to pay the amount of such purchase money to such person or persons as should be lawfully entitled to receive the same, and to whom he could pay the same in safety; and he hereby offers to bring the same into court, as the court shall direct.

ploy of your complainant as a laster, with bodily harm if he continued to remain in said employ, and, by threats and intimidations, endeavored to force him to leave said employ.

And your complainant further shows that on the seventeenth day of April, last past, one William McDermott, who was then in the employ of your complainant as a laster, was compelled by certain members of said association whose names are unknown to your complainant to go to the hall then and there occupied by said association, and the said members of said association, together with the said Leach, did then and there threaten him, the said McDermott, that if he continued to work for said Sherry he would be "fixed" the same as the other men had been who had worked for said Sherry, meaning thereby the men who had been assaulted; that the said McDermott was then and there intimidated from working for said Sherry and then and there left his employ on account of said intimidations as aforesaid.

Seventh. And the said banner and acts of the said defendants were part of a scheme of the defendants, and the said association, whereby by threats and intimidations, to prevent persons from hiring themselves to, or accepting work from, your complainant, and there were divers persons in and in the vicinity of Lynn and elsewhere, who, by reason of such notices and the liabilities under which they would place them in regard to said association, were intimidated and prevented from hiring themselves to your complainant.

Eighth. And your complainant further shows that for the purpose of intimidation and preventing men from entering into the employ of your complainant, the said defendants continued to have said banner carried in front of his said factory from the said fifth day of January until the twenty-second day of March last past, when the said defendants, in order to prevent persons from entering into engagement with your complainant for carrying on his business, and so to prevent men who had formerly worked as lasters for your complainant and who had left on account of the acts of the defendants and on account of the threats and intimidations used by the said defendants, and for the purpose of deceiving the same, and with the assent and concurrence of the members for the time being of the said association, and out of moneys contributed by the association for that purpose, published and caused to be carried by a boy employed by said defendants for said association, and paid out of the money of said association, a certain placard of the tenor following: "Lasters on a strike; all lasters are requested to

And your orator further represents that he does not in any respect collude with either of the said named defendants, touching the matters in controversy in this cause; nor is he in any manner indemnified by the defendants, or either of them; nor has he exhibited this, his bill of interpleader, at the request of the defendants, or either of them, but merely of his own free will and to avoid being molested, vexed and harassed touching the matters contained herein.

keep away from P. P. Sherry's until the present trouble is settled. Per order L. P. U."

Ninth. And your complainant further shows that there is no strike in his business and there is no trouble between himself and his employes, but that the said defendants and other members of said association have caused said banner to be published and carried for the purpose of deceiving the public and for the purpose of intimidating and preventing many competent persons who are willing to take situations in the employ of your complainant as lasters, from hiring themselves to, or accepting work from, your complainant.

Tenth. And your complainant has remonstrated with the said defendants and other members of said association against the continuance of said banners and placards, but the said defendants and other members of the said association not known to your complainant, for the purpose of injuring your complainant in his business and for the purpose of depriving him of the rights of carrying on his business and employing whomsoever he may see fit, and for the purpose of intimidation and threatening, and for the purpose of exciting riot and disturbances in front of his factory, insisted, and still insist, upon keeping said banner or placard exposed to public view in front of the factory of your complainant; whereby, by reason of all the acts of all the said defendants and the association as aforesaid, they have in fact intimidated and prevented persons from hiring themselves to, and accepting work and employment from, your complainant; they have caused certain persons in the employ of your complainant to be put in fear of great bodily harm and injury, and the persons so in his employ are in danger of bodily injury and of their lives, and are being constantly threatened by said defendants and other members of said association unknown to your complainant, and by persons instigated by the aforesaid acts of the defendants and said other members of said association.

Eleventh. And your complainant further shows that the business carried on by him is of considerable magnitude and the good will thereof is of great value; that it is essential to the maintenance of said business that he should be able to continue in the same without stoppages; that he receives orders for the manufacture of his products which must be delivered within certain times, and if he should be unable to carry out his contract,

Your orator therefore prays that the said C. D. and E. F. may be made parties defendant to this bill, and full and direct answer make to the same; that the said defendants may severally set forth to which of them the said sum of ——— does of right belong, and is payable, and how in particular they make

he would be put to great loss and damage, and the people in his employ and dependent upon him for wages and for a share of the profits of his business, would be injured, and in addition to said loss arising from cessation of work, the good will of his business would be greatly diminished in value and his property would suffer great damage.

Twelfth. And your complainant further shows that he manufactures, in competition with others, a certain line and grade of boots and shoes, and that he has certain customers whose orders he is obliged to fill from time to time as he receives them, and that by the acts of the defendants and of the association, he is prevented from carrying out said orders as fully and as effectually as he might do if not interfered with and injured by their said acts; and that if said acts of the defendants and said association are permited, he will lose said orders and customers for his products, and his business will be irreparably injured and destroyed, and the value of his property severely diminished and put in jeopardy of being entirely lost.

Thirteenth. And your complainant therefore prays that the defendants Perkins and Leach, as well on their own behalf as on behalf of all members of the said association, their servants and agents, may be restrained from printing or publishing any placards, banners or advertisements similar to those already set forth, or of the like effect, and from having the same carried as above set forth, or using any other methods whereby the property of your complainant, or his business, or the interests of those in his employ, might be damnified or injured, or whereby any persons may be unlawfully hindered from working in your complainant's factory or from hiring themselves to, or accepting work from, your complainant; and that the defendants may be compelled to pay the costs of this suit; and for such other and further orders and decrees in the premises as justice requires.

We also subjoin another form taken from the original papers in the case of Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722:

First. And the plaintiff says that he is at present, and has been for many years, engaged in business as a manufacturer of parlor suits, lounges, student chairs, furniture, couches, etc., in the premises numbered 141, 143, 145 and 147 North street in said Boston, and employs a large number of men in carrying on his said business in said premises; that there are in said Boston certain associations called "The International Furniture Workers' Union of America," and "The Wood Workers' Local Union," Nos. 24 and 53, composed of persons engaged in similar occupations to that of the

out their several claims thereto; that the defendants may interplead and settle and adjust their said demands between themselves, your orator being willing and desirous, and agreeing, that the said sum may be paid to such of them to whom the same shall, in the judgment of the court, appear of right to

defendants, of which the said defendant, George M. Guntner, is agent.

Second. The plaintiff says that on or about October 11, 1894, he received a communication from the defendant unions, a copy whereof is hereto annexed and marked "A."

Third. Plaintiff says that on or about Wednesday, November 21, 1894, without notice and without warning, all of the individual defendants, except the said George M. Guntner, struck and left the plaintiff's employment and premises in a body.

Fourth. Plaintiff says that since November 21, 1894, he has endeavored to carry on his said business in said premises and to employ other men to fill the places of said defendants, but that the said defendants, their agents and servants, have wilfully and maliciously continuously patrolled the streets in front of said premises in groups and squads, and have used indecent language and epithets and vile language to those working in his employ in the places made vacant by the defendants; that they have wilfully and maliciously blocked up the doorway and entrance of his said premises, and there intercepted, interfered with, and intimidated persons who desired to visit the factory and premises aforesaid for the purpose of engaging in the employment of the plaintiff, and for the purpose of trading with the plaintiff; that they have wilfully and maliciously intimidated and threatened the parties whom he has employed as aforesaid to fill their said places, with bodily harm if they continued in the plaintiff's employment, and have caused certain new men employed as aforesaid to leave the employment of the plaintiff and said premises.

Fifth. Plaintiff says that the said defendants, their agents and servants, have notified the insurance companies that the property there was in danger, and have attempted to effect a cancellation of the insurance carried by the plaintiff on his stock of goods; that they have followed the delivery team of the plaintiff in divers places and cities, have been to several customers of the plaintiff and threatened to injure said customers of the plaintiff and their business if they continued to trade with the plaintiff, and generally to injure the said plaintiff in his said business, and to prevent his continuing to carry on said business; that said defendants, their agents and servants, have been and are a veritable nuisance and obstruction to persons traveling on said street, and to persons in the employ of the plaintiff and to persons intending to trade with the plaintiff at his said premises. And all acts of defendants are a part of a scheme to prevent persons from entering the employment of the plaintiff and from continuing in

belong; that your orator may be at liberty to bring and pay the said sum of ——— dollars into this honorable court, which your orator hereby offers to do, for the benefit of such of the defendants who shall appear to be entitled thereto, and subject to the further order of the court; that the defendant, E. F., may be restrained by the injunction of this court from proceeding against your orator in the said action at law for the purchase money of said property, and that all the defendants may be restrained from commencing any action or actions against your orator for the recovery of the said sum of ——— dollars, or touching any matters or things aforesaid; that the said C. D. may be decreed to deliver the said promissory note to your orator to be canceled; and that your orator may have such

said employment, and in like manner, to prevent other persons from entering into such employment.

Sixth. And plaintiff says that the business carried on by the plaintiff is a large one, and the good will is of considerable value, in both of which the plaintiff has already been injured; and if the defendants are permitted to continue, both said business and said good will will be further seriously injured and destroyed.

Wherefore, the plaintiff prays that an injunction issue from this Honorable Court, strictly enjoining and restraining the said respondents, and all and every person before named, to desist and refrain from visiting the said factory and said premises occupied by the plaintiff, or causing any other person or persons to visit said factory and said premises, or from stopping or remaining in the vicinity of said factory and said premises, for the purpose of interfering with the workmen of the plaintiff or any person who may desire to visit the factory or premises of the plaintiff for the purpose of engaging in the employment of the plaintiff; or by intimidation, insults or threats, inducing any person in the employment of the plaintiff, to leave such employment; or by intimidations, insults or threats inducing any person to refrain from entering into the employment of the plaintiff; and that the defendant and all members of the association be enjoined and restrained from any and all acts or the use of any methods, within or in the immediate vicinity of the plaintiff's said factory and said premises, which will tend to hinder, impede or obstruct the plaintiff in the transaction of the business of the plaintiff at said factory and in said premises, or which will tend to hinder, intimidate or annoy the workmen of the plaintiff as they visit said factory and premises or depart from the same, and from annoying and intimidating persons who may desire to work in the plaintiff's premises; and plaintiff prays for such further relief as to this Honorable Court shall seem just and meet.

other and further relief in the premises as equity may require, and to Your Honor shall seem meet. A. B.,

J. L., By Counsel.[81]

Solicitor for the Plaintiff.

[*Add affidavit as in No. 266.*]

No. 140.

§ 994. Of committee of insane person to sell such person's estate.

[*After the title of the cause, mutatis mutandis, as shown in No. 4.*]

Your orator, A——— B———, committee of C——— D———, an insane person, complaining, sheweth:

1st. That upon proceedings duly had before ———, the commission of lunacy within and for the county of ———, in said state, the said C——— D——— was duly adjudged insane and committed to the asylum, as will more fully and at large appear from the records of said proceedings, a copy of which is herewith filed as an exhibit, marked "Exhibit No. 1," and made part hereof; that subsequently, on the ——— day of ———, 19—, by virtue and in pursuance of proceedings duly had before the ——— court of said county, your orator was appointed, gave bond and qualified, as the committee of the said C——— D———, which will more fully appear from the record of said proceedings, and said bond, attested copies of which are herewith filed, marked, respectively, "Exhibit No. 2" and "Exhibit No. 3," and made parts of this bill.

[81] See Puterbaugh, Ch. Pl. and Pr. (2nd Ed.), p. 342, from which the above form is taken.

For a form of a bill of interpleader based on Hoffman v. Beltzhoover, 71 W. Va. 72, 76 S. E. 968, see 3 Whitehouse, Eq. Prac., 2365.

2nd. Your orator further sheweth unto Your Honor that the said C——— D——— is the owner in fee simple of a certain parcel of land situate in [*here describe the same*], conveyed to the said C——— D——— by ———. by deed dated the ——— day of ———, 19—, duly of record in the office of the clerk of the county court of said county in Deed Book No. ———, at page ———, a certified copy of which is herewith filed, marked "Exhibit No. 4," and made a part of this bill; that the only personal property or estate owned by the said C——— D——— consists of [*here describe the same*]; that the said C——— D——— is now confined in the Second Hospital for the Insane in Spencer, in the county of Roane, state of West Virginia; that no one is interested in the said real estate except the said insane person himself [*In Virginia, add here,* that the defendant, J——— D———, son of the said C——— D———, *or whatever the relationship may be,* would be the only heir and the only distributee of the said C——— D——— if the latter were dead.]

3rd. Your orator here sheweth unto the court that a sale of the aforesaid tract of land would promote the interests of the said insane person because, as your orator avers [*here state the facts or grounds relied on to show that the interests of said insane person would be promoted by said sale*].

4th. Your orator further sheweth unto the court that the rights of no person will be violated by a sale of the said real estate.

Your orator therefore prays that the said C——— D——— and the said J——— D——— may be made parties defendant to this suit; that a suitable person be appointed guardian *ad litem* for the said insane person; that the said guardian *ad litem* be required to answer this bill under oath; that the said tract of land be sold and the proceeds of sale invested for the benefit of said C——— D——— as the court may direct; that all proper orders and decrees may be made and accounts and inquiries directed; and for such other further and general

relief as the nature of the case may require or may seem proper in the premises And your orator will ever pray, etc.

A——— B———,
Committee of C——— D———,
By Counsel.[82]

R——— Q——— C———.
Counsel.

[*Append affidavit as in No. 259 in West Virginia, as in No. 262 in Virginia.*]

No. 141.

§ 995. To impeach a decree on the ground of fraud.

[*After the usual caption, address and commencement.*]

T——— B———, deceased, your orator's late father, during his life, and on or about the ——— day of ———, 19—, was seized in his *demesne,* as of fee, of and in the real estate hereinafter particualrly described; and by indenture of that date, made between the said T——— B———, of the one part, and C——— D———, the defendant hereinafter named, of the other part, the said T——— B———, in consideration of $———, bargained, sold and conveyed unto the said C——— D———, his heirs and assigns, all, etc. [*describe the mortgaged premises*], subject to redemption on payment of the said principal money and lawful interest at the time therein mentioned, and long since past; as by said indenture [*here describe the record of the indenture, if recorded*], reference being thereto had, will more fully appear. And your orator further sheweth that the said T——— B——— departed this life on or about the ——— day of ———, 19—, leaving this plaintiff his heir-at-law and only child, then an infant under twenty-one years of age; that is to say, of the age of seven years or thereabouts, him surviving. And your orator further sheweth that during

[82] The foregoing bill is predicated upon the statutes of the Virginias, which are almost identical, regarding the sale of the property of persons under disability, and the case of Palmer v. Garland's Committee, 81 Va. 444 See *ante,* No. 21, and note.

As to the propriety of filing the exhibits above described with the bill, see *ante,* § 933, note 19.

your orator's minority, on or about the ——— day of ———, 19—, the said C——— D——— filed his bill of complaint in this honorable court against the plaintiff for a foreclosure of the plaintiff's right and equity of redemption in the said mortgaged premises; but your orator was not represented in such bill to be an infant; and the said C——— D——— caused and procured one L——— M———, since deceased, who acted in the management of the affairs of your orator's said father, to put in an answer in the name of your orator, and without ever acquainting your orator, or any of his friends or relations therewith; in which said answer a much greater sum was stated to be due from your orator on the said mortgage security to the said C——— D——— than in fact was really owing to him, and for which it was untruly stated that the mortgaged premises were an insufficient security. And in consequence of such answer being put in, the said C——— D——— afterwards, in conjunction with the said L——— M———, on or about the ——— day of ———, 19—, obtained an absolute decree of foreclosure against your orator, which your orator has only lately discovered, and of which your orator had no notice, and in which said decree no day is given to your orator, who was an infant when the same was pronounced, to show cause against it when he came of age; as by the said proceedings, now remaining as of record in this honorable court, reference being thereto had, will more fully appear. And your orator further sheweth that he, your orator, on the ——— day of ———, 19—, attained the age of twenty-one years, and shortly afterwards, having discovered that such transactions had taken place during his minority, as aforesaid, by himself and his agents, represented the same to the said C——— D———, and requested him to deliver up possession of the said mortgaged premises to your orator, on being paid the principal money and interest, if any, actually and fairly due thereon, which your orator offered, and has at all times been ready to pay, and which would have been paid by the personal representatives of the said T——— B——— out of his personal assets during

your orator's minority, had any application been made for that purpose. And your orator hoped that the said C——— D——— would not have insisted on the said decree of foreclosure, so fraudulently obtained as aforesaid, but would have permitted your orator to redeem the said mortgaged premises, as he ought to have done. But now so it is, the said C——— D——— pretends that the said decree of foreclosure was fairly and properly obtained, and that a day was therein given your orator, when of age, to show cause against the same, and that your orator has neglected to do so, and that the plaintiff is neither entitled to redeem, nor to travel into the said accounts; whereas, your orator charges the contrary thereof to be true, and that your orator attained the age of twenty-one years only on the ——— day of ———, and that he has since discovered the matters aforesaid by searching in the proper offices of this honorable court; and your orator expressly charges that, under the circumstances aforesaid, the said decree, so fraudulently obtained as hereinbefore mentioned, ought to be set aside, and your orator ought not to be precluded thereby, or in any other manner, from redeeming the said mortgaged premises of which the said C——— D——— has possessed himself by such means as aforesaid.

Your orator therefore prays that the decree of foreclosure made, for the reasons and under the circumstances aforesaid, be set aside and declared to be fraudulent and void; that an account may be taken of what, if anything, is now due to the said C——— D——— for the principal and interest on said mortgage; that an account may be also taken of the rents and profits of the said mortgaged premises which have, or without his wilful default might have, been received by or on behalf of the said C——— D———, and if the same shall appear to be more than the principal and interest on said mortgage, then that the residue thereof may be paid over to your orator, and that your orator may be at liberty to redeem the said mortgaged premises, on the payment of the principal and interest, if any remain due on said security; that the said C———

D——— may be decreed, on being paid such principal sum and interest, to deliver up possession of said mortgaged premises, free from all incumbrances, to your orator or as he shall appoint; and grant unto your orator such other further and general relief as to equity may seem meet, and as in duty bound he will ever pray, etc.

A——— B———,
By Counsel.[83]

F——— G———,
Solicitor for the Plaintiff.

[83] The foregoing form will be found in Mitford & Tyler's Equity Pl., 568.

It is well settled that where a decree has been obtained by fraud or collusion between the parties it may be impeached by an original bill filed for that purpose. Walker v. Day, 8 Baxt. (Tenn.) 77; Sanford v. Head, 5 Cal. 297; Adair v Cummins, 48 Mich. 375, 12 N. W. 495; Loomer v. Wheelwright, 3 Sandf. Ch. (N. Y.) 135, 7 L. Ed. 800, and note. Such a bill may be filed without leave of the court as matter of right. Evans v. Bacon, 99 Mass. 213; De Louis v. Meek, 2 G. Green (Iowa) 55, 50 Am. Dec. 491; Allen v. Hawley, 66 Ill 164. Either for fraud in fact or fraud in law. Gooch v. Green, 102 Ill. 507; Adair v Cummins, *supra*.

As to the essential allegations of a bill of this kind, see *ante*, § 130.

In Springston v. Morris, 47 W. Va. 50, 34 S. E. 766, it was contended that the recitals in the decree could not be questioned, counsel predicating his contention upon the case of State v. Vest, 21 W. Va. 796; but the court, in its opinion, says that "this is not the rule where a decree is directly impeached for fraud or surprise in its procurement. It may be an absolute verity as to what occurred in court and was there recorded, but not as to the recitals therein contained as to what occurred other than in the presence of the court at the time of the entry of the decree. Black, Judgm., § 238. If such rule were to be held good in all cases, no decree could be impeached for fraud or surprise; and yet such is ordinary equity jurisdiction. Bart., Ch. Prac. (2nd Ed.), p. 841. The doctrine of the absolute verity of the record must always yield to that higher equitable doctrine that fraud vitiates all things. 'It is the just and proper pride of our mature system of equity jurisprudence that fraud vitiates every transaction; and however men may surround it with forms, solemn instruments, proceedings conforming to all the details required in the laws, or even by the formal judgment of courts, a court of equity will disregard them all, if necessary, that justice and equity may prevail' *Warner* v. *Blakeman*, 43 N. Y. 507; Freem., Judgm., § 489. The proper way in which to attack such a decree, when the object is merely to set aside the decree, and then permit the original suit to continue to final hearing, is by an original bill in the nature of a bill of review.

No. 142.

§ 996. In a suit upon a lost instrument.

[*After the usual caption and address.*]

Your orator, complaining, says, that on the ——— day of ———, 19—, the defendant C——— D——— executed to him his two several promissory notes bearing date on the day and year last aforesaid, each in the sum of five hundred dollars, payable in one and two years, respectively, with interest thereon from date; that these two notes were given for money which your orator lent the said C——— D———.

Your orator further says that there has been nothing whatever paid upon the said notes, and that they are now due and payable; that your orator can not produce the said notes; that your orator has made diligent search for the said notes but he is unable to find them, and your orator therefore alleges that the said notes are either lost or destroyed.

Your orator says that the said C——— D——— declines to pay the said notes, and insists that he will not do so unless your orator can produce the said notes and surrender them to the said defendant, but your orator says that he can not surrender said notes at this time because he is unable to find and produce them.

Your orator further says that he is willing to indemnify the said defendant against all damage or loss by reason of your orator's being unable to produce and surrender the said notes, and will give such indemnity at any time that the same may be required by the court, and will give such surety in the execution of the bond of indemnity as the court in its discretion may require.

Your orator therefore prays that he may have a decree setting up and establishing said notes as valid evidence of indebt-

Manion v. *Fahy*, 11 W. Va. 482. So the plaintiffs' bill must be regarded. *Sturm* v. *Fleming*, 22 W. Va. 404. The object of the original part of the bill is to set up new matter, not in the record, impeaching the recitals of the decree."

edness of the said defendant, that he may have a decree against the said defendant for the payment of said bonds for their principal and interest. Your orator asks such other further and general relief as to equity may seem meet, and as in duty bound he will ever pray, etc.

A——— B———,
By Counsel.[84]

L——— P——— Q———,
Attorney for the Plaintiff.

[*Append affidavit as in No. 268.*]

No. 143.

§ 997. To set up a lost will.

[*After the usual caption and commencement.*]

On the ——— day of ———, 19—, J——— J——— W———, then in life and of sound mind and disposing memory, made

[84] The above is the form of a bill brought to establish a lost instrument and obtain a personal decree against the defendant independently of any ground of equity jurisdiction save the loss of the instrument sued on. In Robinson v. Dix, 18 W. Va. 528, the suit was on a lost instrument, but its payment was secured by the reservation of a vendor's lien in a deed made to the vendee, so that the court's jurisdiction attached independently of the loss of the instrument there by reason of the plaintiff's right to enforce his lien. So, the same ground for equity jurisdiction existed in Moore v. Smith, 26 W. Va. 379. In Hunter v. Robinson, 5 W. Va. 272, equity jurisdiction attached on other grounds than that of the mere loss of the instrument. But in Cleavenger v. Franklin Fire Ins. Co., 47 W. Va. 595, 35 S. E. 998, the suit was brought in equity to set up a lost or destroyed insurance policy, in which the only ground of equity jurisdiction was the loss of the instrument, and there the court upheld the jurisdiction and granted a personal decree against the defendant insurance company. That a lost instrument may be enforced in equity on the mere ground of its loss and a personal decree obtained against the defendant, see Hogg, Eq. Princ., § 301. Also see, Clark v. Nickell, 73 W. Va. 69, 79 S. E. 1020; Kabler v. Spencer, 114 Va. 589, 77 S. E. 504.

his last will and testament, whereby, after the payment of his debts and funeral expenses, he devised and bequeathed all his estate, both real and personal, to the said A——— W——— for and during her natural life, and after her death to T——— D———, this plaintiff, and A——— E——— C——— and their heirs forever in equal moieties, appointing his wife, the said A——— W———, as executrix, with the provision that she should not be required to give bond as such executrix. The witnesses to said will were R——— S——— and W——— D———, who subscribed their names as witnesses thereto at the request of the said J——— J——— W———, in his presence and in the presence of each other; and the said J——— J——— W——— subscribed his name to said will in the presence of said R——— S——— and W——— D———, who were present at the same time the said J——— J——— W——— subscribed his name thereto.

On the ——— day of ———, 19—, the said testator departed this life, but the said will could not be produced as the same was destroyed by the said A——— W——— in a fit of anger; and the said A——— W——— destroyed this will out of the presence of the said testator and without his knowledge or consent, and only a few days before the death of the said J——— J——— W———; and plaintiff says that the said J——— J——— W——— died without any children and that his sole heirs at law are two brothers, whose names are O——— W——— and E——— W———.

Your orator is advised that she may come into a court of equity to have the said will set up and established, and its contents ascertained and determined, so as to protect her rights and interests therein.

Your orator therefore prays that the said A——— W———, A——— E——— C———, E——— W——— and O——— W——— may be made parties defendant to this bill; that she may have a decree setting up and establishing the said instrument as the last will and testament of the said J——— J——— W———, the testator; and grant unto your oratrix such other,

further and general relief as to equity may seem meet, and as in duty bound she will ever pray, etc.

T——— D———,
By Counsel.[85]

F——— & H———,
Solicitors for the Plaintiff.

[*Add affidavit as in No. 259.*]

No. 144.

§ 998. To enforce a laborer's lien against a corporation.

[*After the usual caption and commencement.*]

The defendant, The G——— S——— & C——— Company, is a corporation, created, organized and existing under and by virtue of the laws of the state of West Virginia, the principal office and place of business of which corporation is situated in the county and state aforesaid, and which corporation was on the ——— day of ———, 19—, engaged in the manufacture and sale of salt, employing for that purpose several workmen and laborers; and the said company had been so engaged in the manufacture and sale of salt for many months prior to the ——— day of ———, 19—. Among the workmen and laborers employed by said corporation were this plaintiff and the defendants, B——— M——— S———, W——— D——— and W——— T——— D———; and the said plaintiff and the said defendants last above named performed work and labor for said corporation, under and by virtue of a contract with it, during the months and times set out and specified in the accounts and notices of liens therefor, which are herewith filed marked exhibits numbers 1, 2, 3 and 4, respectively, and made parts of this bill. The said accounts and affidavits thereto annexed were duly filed with the clerk of the county court of

[85] The form given above is based upon the case of Dower v. Seeds, 28 W. Va. 113, 57 Am. Rep. 646, which holds that equity has jurisdiction to set up a lost, suppressed or destroyed will. See 3 Whitehouse, Eq. Prac., 2150, for a form of bill to set up a lost will based on the same case.

said county on the ——— day of ———, 19—, and within ninety days from the time the plaintiff and defendant laborers above named ceased to labor for said corporation, and were filed for record as aforesaid in the Mechanics' Lien Record of said county.

Plaintiff avers that the plaintiff and the said defendants, who worked and labored for said corporation as aforesaid, ceased to do so at the dates and times mentioned in said accounts.

Plaintiff says that the said defendant corporation at the time when this plaintiff and said defendant laborers ceased to work and labor for said corporation under their contract with it as aforesaid, was and still is the owner of the following real estate: [*here describe the same*]; as well also as of the following personal property: [*here describe the same*].

The plaintiff is informed and believes, and so charges the fact to be, that after allowing all credits to which said corporation is entitled on the said accounts, filed for record in the Mechanics' Lien Record as aforesaid, there is due and owing from said corporation for labor performed by this plaintiff and the said defendant laborers as aforesaid, the following sums and balances, respectively: To this plaintiff, ——— dollars; to the defendant, B——— M——— S———, ——— dollars; to the defendant, W——— D———, ——— dollars; and to the defendant, W——— T——— D———, ——— dollars; each and every one of which amounts due for labor performed as aforesaid constitutes a lien upon the property aforesaid owned by the said corporation as aforesaid, and became a lien thereon as soon as the accounts therefor and affidavits thereto attached were filed and recorded with and by the clerk of the county court as aforesaid.

Plaintiff further says that the only laborers' liens on the property aforesaid belonging to the said defendant corporation are the said liens hereinbefore set forth and described; that said accounts and debts which constitute liens as aforesaid, upon the property aforesaid, remain wholly unpaid and are still valid and subsisting liens against the said property.

Your orator therefore prays that he may have a decree enforcing his said lien, as well as those of the said defendant laborers as aforesaid; that this cause may be referred to one of the commissioners in chancery of this court to state and report all the liens existing against the property hereinbefore described, their amounts and respective priorities; and grant unto your orator such other further and general relief as to equity may seem meet, and as in duty bound he will ever pray, etc.

W——— A——— R———,
By Counsel.[86]

W——— L——— B———,
Solicitor for the Plaintiff.

No. 145.

§ 999. To enforce a mechanics' lien.

[*After the usual caption and address.*]

The plaintiff complains and says that he is a mechanic and artisan, and as such is engaged in business in the town of M.. county of ———, and state of ———.

The plaintiff further says that on the *25th* day of *June*, in the year *19*—, he commenced furnishing to the C. C. Company aforesaid, by virtue and in pursuance of a verbal contract entered into and made between said plaintiff and the said C. C. Company, the materials mentioned and described in the account herewith filed, marked "Exhibit A," and prayed to be made and taken as a part of this bill; that said materials were so furnished, pursuant to the contract aforesaid, for the purpose of and were used in the altering and repairing of the building and appurtenances thereto belonging known as the B. S. F., located on the following real estate, situated in ———

[86] This form is adapted to the statute of West Virginia, W. Va. Code, 1918, c. 75, §§ 19-21 (see Acts 1917, c. 6, §§ 19-21), providing for a lien in favor of every workman, laborer or other person who shall do or perform any work or labor by virtue of any contract directly for any incorporated company doing business in that state, or indirectly for it through the medium of its general contractor or sub-contractor.

district, in the county of ———, and state of ———, in the town of ———, and more particularly bounded and described as follows, to-wit: [*here describe the property sufficiently for identification*], and is the same real estate, building and appurtenances mentioned and described in "Exhibit C" hereinafter referred to and identified.

The plaintiff further says that the said C. C. Company, at the time of the making of said contract for the purchase of said materials as aforesaid to alter and repair said buildings and appurtenanees, was the owner of said real estate, together with the buildings and appurtenanees thereon, as will more fully appear from a certified eopy of a deed for said property herewith filed, marked "Exhibit B" and prayed to be made and taken as a part of this bill.

The plaintiff says that within ninety days from the time he ceased to furnish said materials as aforesaid, he caused to be recorded in the office of the clerk of the county court of ——— county, in said state, a notice of lien, as provided by statute, stating that the plaintiff claims a lien upon said property to secure the payment of the sum of $———, together with a description of the property intended to be covered by said lien, sufficiently accurate for identification, and with the name of the owner of said property as above deseribed; that said notice was subscribed and sworn to by said plaintiff; that on the *17th* day of *August, 19—*, said notiee was duly recorded in the mechanics' lien record in the office of the elerk of the county court of ——— county, aforesaid, in book No. 1, pages 86, etc., as required by law; all of which will more fully appear from said notice filed herewith, marked "Exhibit C," and made a part hereof.

The plaintiff further says that this suit to enforee the mechanies' lien aforesaid was eommenced by issuance of original process therein by the elerk of said court on the *15th* day of *January, 19—*, and within six months from the filing of the said account with the clerk of the county court aforesaid.

The plaintiff now eharges that there is now due and owing from the said C. C. Company to him, the said plaintiff, the

sum of $———; that no part thereof has been paid by said defendant, and that the same is a valid and subsisting lien against the land, buildings and appurtenances thereon hereinbefore described; and that there are no other liens of the class ordinarily designated as "mechanics' liens" upon said property.

The said plaintiff therefore prays that the said tract of land may be sold to pay off and satisfy his claim aforesaid to the amount of $———, with interest thereon from the *17th* day of *August, 19—*, and he asks for such other, further and general relief as to equity may seem meet, and as in duty bound he will ever pray, etc.

E——— T———,
By Counsel.[87]

No. 146.

§ 1000. To enforce a vendors' lien.

[*After the usual caption, address and commencement.*]

On the ——— day of ———, 19—, your orator was the owner in fee simple of a certain tract or parcel of land containing ——— acres, situate in the district of ———, county of ———, and state aforesaid, and on that day by deed of that date he sold and conveyed the same to the defendant C——— D——— for the sum of ——— dollars, of which ——— dollars was paid in cash, and for the residue of the said purchase money the said C——— D——— executed two notes payable to your orator or his order, each in the sum of ——— dollars,

[87] The foregoing form is taken from the record in the case of Turnbull v. Clifton Coal Co., 19 W. Va. 299, with modifications suggested by amendments to the statute made by the West Virginia Legislature, by Acts of 1917, c. 6. See Lunsford, Withrow & Co. v. Wren, 64 W. Va. 458, 63 S. E. 308; Barthlow v. Hoge, 71 W. Va. 427, 76 S. E. 813, upon the latter of which the form in 3 Whitehouse, Eq. Prac., 2348, is based.

For an extended consideration of the subject of mechanics' liens, see Hogg, Eq. Princ., §§ 514-520

See Va. Code, 1904, §§ 2475 *et seq.*

and bearing even date with said deed of conveyance, as will more fully appear from said deed, duly of record in the office of the clerk of the county court of said county, in Deed Book No. ———, at page ———, an attested copy of which is herewith filed, marked "Exhibit A," and made part of this bill.

After the execution and delivery of said notes to your orator, your orator transferred and assigned one of said notes to the defendant E——— F———, who is now the holder thereof, and your orator is still the holder of the other one of said notes, which is now due and wholly unpaid, and which the said C——— D——— fails and declines to pay.[88]

On the ——— day of ———, 19—, by deed of that date, said C——— D——— conveyed ——— acres of said land to the said defendant G——— H———, which deed was duly admitted to record in the office of the clerk of said county court, in Deed Book No. ———, at page ———, as will more fully appear by said deed itself, an attested copy of which and the endorsement of recordation thereof are herewith filed, marked "Exhibit B," and made part of this bill.

Your orator further sheweth unto Your Honor, as will appear from said deed of conveyance, a copy of which is herewith filed as "Exhibit A," that a lien is reserved on the face thereof to secure the payment of the balance of the purchase money for the sale of the said land, as evidenced by the notes given therefor, as aforesaid, and that the same, as your orator is advised, is enforceable in a court of equity.

Your orator therefore prays that the said C——— D———, E——— F——— and G——— H——— be made parties defendant to this bill; that a decree may be entered for the sale of said land to pay off and discharge said notes and the interest thereon, and the costs of this suit, decreeing first the sale of the land remaining unsold and still in the control and

[88] It will be noted in this case that one of the notes is held by a third party by assignment, and having an interest therefore in the suit he is a proper party.

ownership of the said C——— D———,[89] and, if that be insufficient, then that the part of said tract conveyed to the said G——— H———, or so much thereof as may be necessary; and grant unto your orator such other, further and general relief as to equity may seem meet, and as in duty bound he will ever pray, etc.

A——— B———,
By Counsel.

H——— C———,
Solicitor for the Plaintiff.

No. 147.

§ 1001. For partition.

[*After the usual caption and address.*]

Your orator's father, T. B., was in his lifetime seized and possessed of certain real estate lying in the county of ——— and bounded and described as follows: [*here describe it*]; and being so seized and possessed, the said T. B., on or about the ——— day of ———, 19—, died intestate, leaving your orator, and R. B., E. B. and S. B., his only children and heirs-at-law. The said E. and S. are infants under the age of twenty-one years. And your orator further states that the said real estate is, as he believes, susceptible of partition among the parties entitled thereto; but if it can not be so divided, then your orator desires that the same may be sold and the proceeds divided among the adult and the infant parties hereto according to their respective rights; the shares of the infants to be held as directed by the statute in such case made and provided. Should the property not be divisible in kind, your orator believes, and here states, that the interests of those who are entitled to the said real estate, or its proceeds, will be promoted by a sale of the whole of the same, or by an allotment of part and sale of the residue.*

[89] Where a conveyance has been made of a part of the property upon which a vendor's lien has been retained, the vendee of such part should be made a party to the bill. McGlaughlin v. McGraw, 44 W. Va. 715, 30 S. E. 64.

Forasmuch, therefore, as your orator is remediless in the premises save by the aid of a court of equity, he prays that the said R. B., E. B. and S. B. may be made parties defendant to this bill and required, but not on their oath, to answer the same, the oath being hereby waived, the said adult in his own proper person, and the infants by guardian *ad litem;* that a proper guardian *ad litem* be appointed in this cause for said infants who shall also answer this bill; that proper process issue; that the said real estate be divided between the parties entitled thereto, or else that it be sold and the proceeds divided, in case it be indivisible in kind; that all proper orders and decrees may be made, accounts taken and enquiries directed, and that all such other further and general relief as in the premises may be just and right may be granted. And your complainant will ever pray, etc.

A. B.,
By Counsel.[90]

Q., G. & S.,
Solicitors for the Plaintiff.

No. 148.

§ 1002. For partition and account.

[*As in No. 147 mutatis mutandis to the* * *and then continue as follows:*]

Your orator further states that the said Robert J. has been enjoying the said property, the whole of it, ever since the death of said Thomas J., and has been receiving the rents and profits

[90] The above form is taken from 2 Bart., Ch. Pr. (2nd Ed.), 1270, and recently has been approved by the West Virginia Supreme Court of appeals in the following language:

"Following the form prescribed in Hogg, Equity Procedure, § 967 [2nd Ed., § 1001], and fully measuring up to the requirements of the standard prescribed in Richmond v. Richmond, 62 W. Va. 206, 57 S. E. 736, and Martin v. Martin, 95 Va. 26, 27 S. E. 810, the bill is amply sufficient, and the court properly overruled the demurrer." Helmick v. Kraft, 84 W. Va. 159, 99 S. E. 325.

For a form of a bill of partition based on Wooldridge v. Wooldridge, 69 W. Va. 554, 72 S. E. 654, Ann. Cas. 1913B, 653, see 3 Whitehouse, Eq. Prac., 2212.

thereof, one-fourth of which rents and profits should be paid to your orator, and the other shares thereof to the parties entitled thereto.

In tender consideration whereof, and for as much as your orator is remediless in the premises save by the aid of a court of equity, where matters of this kind are alone and properly cognizable, your orator prays that the said Robert J., Emma J. and Samuel J. may be made parties defendant to this bill, and required on their oaths to answer the same; that a proper guardian *ad litem* be assigned to the infant defendants to defend their interests in this suit, who shall also answer this bill; that the said real estate be divided between the several parties entitled thereto, and your orator's portion thereof allotted to him, and in case the said real estate can not be partitioned and divided in kind, that the same be exposed to sale, and the proceeds of such sale be divided among the parties entitled thereto; that an account be taken of the rents and profits of the said real estate from the death of the said Thomas J., and the said Robert J. be decreed and ordered to pay to your orator his portion thereof; that proper process issue; that all proper orders and decrees may be made, and proper enquiries be directed, and that all such other, further and general relief may be afforded your orator as the nature of his case may require, or to equity shall seem meet. And your orator will ever pray, etc.

JAMES J.,
By Counsel.[91]

X——— X———,
Solicitor for the Plaintiff.

No. 149.

§ 1003. For partition when some of the parties are unknown.

[*After the usual caption, address and commencement.*]

Your complainant's father, Thomas J., was in his lifetime seized and possessed of certain real estate lying in the county of

[91] The above form is taken from Sands, Suit in Equity (2nd Ed.), 58.

[*here describe it*], and being so seized and possessed of the said real estate, some time in the year 19— the said Thomas J. departed this life intestate, leaving Robert J., Julian J., Emma J., Samuel J., and this complainant, his only children and heirs-at-law; and the said Emma and Samuel are infants under the age of twenty-one years. The said Julian J., some time after the death of the said Thomas J., removed to the state of Kentucky, there married Lucy R., and then removed to some other state, your complainant believes to Texas; and afterwards, as was reported, the said Julian J. departed this life, and his widow has also since died. Your complainant has heard, and believes, that the said Julian left several children and heirs-at-law; the number and names of whom are unknown to your complainant. The said children and heirs-at-law of the said Julian J. would be entitled together to one-fifth of the said real estate.

And your complainant further states that the said real estate is, as he believes, susceptible of partition among the heirs thereto; but if it be not, then your complainant desires the same to be sold, and the proceeds to be divided among the adult and the infant parties hereto according to their respective rights, the shares of the infants to be held as directed by the statute in such case made and provided. Should the said property not be divisible in kind, your complainant believes and here states that the interests of those who are entitled to the said real estate or its proceeds will be promoted by a sale of the whole of said real estate, or by an allotment of part thereof, and sale of the residue.

In tender consideration whereof, your complainant prays that the said Robert J., Emma J. and Samuel J., and the unknown heirs-at-law of the said Julian J., deceased, may be made parties defendant to this bill; that a proper guardian *ad litem* be assigned the infant defendants to defend their interests in this suit, who shall also answer this bill; that proper process issue; that an order of publication be made against the said unknown heirs-at-law of the said Julian J., deceased, and duly published; that said real estate be divided between the several parties entitled thereto, and your complainant's portion thereof be allot-

ted to him, and in case the said real estate can not be partitioned and divided in kind, that the same be exposed to sale, and the proceeds of such sale be divided among the parties entitled thereto; that all proper orders and decrees may be made, and proper enquiries directed, and that all such other, further and general relief may be afforded your complainant as the nature of his case may require, or to equity shall seem meet. And your complainant will ever pray, etc.

X——— X———, JAMES J.,
Solicitor for the Plaintiff. By Counsel.[92]

No. 150.

§ 1004. For the dissolution of a partnership and for an injunction.

[*After the usual caption, address and commencement.*]

On or about the ——— day of ———, 19—, your orator entered into articles of partnership with one C——— D———, of the city of B———, for the purpose of conducting the grocery business in the city aforesaid, under the name and style of A——— B——— & Company; a copy of said articles of partnership is herewith filed, marked "Exhibit No. 1," as a part of this bill.

By the express terms of said partnership each partner is required to devote his whole time and attention to the business of the partnership, yet the said C——— D——— has, from the beginning of the partnership business, altogether neglected, and still neglects, to give any attention to the business of the firm, but leaves the business of the partnership entirely to the care and management of your orator.

The said C——— D——— has, at different times, collected large sums of money from the debtors of the firm, for which no entries appear on the books of the firm, and has applied the

[92] The above form is taken from Sands, Suit in Equity (2nd Ed.), p. 59.

same to his own individual use; and has refused to pay just debts due by the firm, though they were contracted by himself in the name of the firm.

There are a large number of debts due to the firm that are in a course of collection in suits in courts, and your orator has reason to believe and to fear that the said C——— D——— will possess himself of the money so collected, or portions of it, without accounting to your orator for it, and will fraudulently use it outside of the partnership business for his individual profit. The said C——— D——— has already abstracted, by his fraudulent dealings with the funds of the firm, a great deal more than his share in the partnership would have been, even if he had accounted for all the funds which have come into his hands in the ways mentioned.

Your orator therefore prays that the said C——— D——— be made a party defendant to this bill and answer the matters and things hereinbefore stated as fully and particularly as if he were specially interrogated with reference thereto; that a receiver may be appointed to take charge of the partnership books and papers of account, and the goods and effects, and to collect the debts due to the firm, and to preserve or dispose of the same under the direction of this court; that the said C——— D——— may, by injunction, be restrained from selling or disposing of or retaining from the receiver appointed as aforesaid any of the goods and effects of the partnership or collecting any debts due thereto, or negotiating any bill or note, or contracting any debt whatsoever on account thereof, or intermeddling in any other manner with the business of the firm; that said partnership may be dissolved; and that your orator may have such other, further and general relief as his case may require, and as in duty bound he will ever pray, etc.

I——— J———,
Solicitor for the Plaintiff.

A——— B———,
By Counsel.[93]

[93] The foregoing form is taken from Mitf. & Tyler, Eq. Pl., 545.

No. 151.

§ 1005. For dissolution of partnership because of defendant's misapplication of funds to his own use, and for a receiver—Short form.

[*After the usual caption and commencement.*]

I. On the first day of January, 1897, the plaintiff and the defendant formed a partnership for the purpose of [*specifying nature of the business*] under articles of copartnership, a copy of which articles is hereto annexed and made a part of this complaint, marked "Exhibit A" [*or, if agreement was not in writing, state the substance thereof*].

II. Under and in pursuance of the aforesaid agreement, plaintiff and defendant entered upon and have ever since continued to carry on the business of said copartnership, and no other articles or instrument has ever been executed between them.

III. The defendant, since the commencement of said partnership, has from time to time applied from the receipts and profits of its said business, to his own use, large sums of money, greatly in excess of the proportion thereof to which he was entitled; and the defendant has always had the management of the books of said copartnership and in order to conceal such misappropriation of funds has never balanced said books.

IV. The plaintiff, on or about the first day of January, 1899, discovered that the defendant was, by reason of his applying the copartnership money to his own use as aforesaid, greatly indebted to said copartnership; and plaintiff then requested defendant to pay all partnership moneys that he, the defendant, had received, into the National Bank of Redemption, in which said bank said corporation was accustomed to keep its accounts, and to draw therefrom only such sums as said copartnership had occasion for; but defendant wholly disregarded the request of plaintiff, and continued to apply to his own use the copartnership moneys received by him, without depositing the same in said bank or in any other bank to the credit of the said firm; and defendant has also taken to his own use the moneys re-

ceived by the clerks and employes of the said firm, and has by said means greatly increased his debts to the said firm, without affording any adequate means to this plaintiff of ascertaining the true state of his accounts.

V. The said defendant has received over and above his due proportion of the copartnership profits the sum of ten thousand dollars, and continues to collect the debts due said copartnership and to appropriate the moneys so collected to his own use.

Plaintiff therefore prays:

1. That the said copartnership may be dissolved and an account be taken of all the dealings and transactions of the said copartnership from the commencement thereof, and of all moneys received and paid by plaintiff and defendant, respectively, in relation thereto;

2. That the property of said firm, both real and personal, be sold; that the debts and liabilities of said copartnership be paid off, and that the surplus, if any there be, be divided between plaintiff and defendant, according to their respective interests;

3. That in the meantime the defendant be enjoined from collecting or receiving or in any manner interfering or intermeddling with or disposing of the debts, moneys or other property or effects of said copartnership;

4. That a receiver of the said partnership moneys, property and effects may be appointed, with the usual powers and duties;

5. That plaintiff have such other, further and general relief as the nature of his case may require and as to equity may seem meet.

A——— B———,
By Counsel.[94]

J——— P——— B———,
Solicitor for the Plaintiff.

[94] See 15 Enc. Forms, 612.

For form of bill for dissolution of a mining partnership, injunction, accounting and receiver, based on Bartlett v. Boyles, 66 W. Va. 327, 66 S. E. 474, see 3 Whitehouse, Eq. Prac., 2235.

No. 152.

§ 1006. To reform or correct a writing on the ground of mistake.

[*After the usual caption and commencement.*]

Heretofore, on or about the *27th* day of *January, 19—*, a certain G. A. C., of the said county, agreed with your oratrix to purchase from her a certain house and farm in the neighborhood of *Frederick City*, in said county, for the sum of $8,500.00, $4,500.00 thereof to be paid on the *first* day of *April, 19—*, the balance in four equal annual payments, with interest, to be secured by notes with security, and to remain a lien on the property sold. On the payment of the $4,500, the said R. C. K. was to execute to the said G. A. C. a good and sufficient deed for said property. It was further agreed that there are *fifty-two* acres of land in the said farm. The grain growing on the said farm was to belong to the said G. A. C. Full possession was to be given to him on the *first* day of *April, 19—*.

And your oratrix further alleges that, in committing the said agreement to writing, the stipulation that the said notes for the four last payments were to bear interest was, by mutual mistake of your oratrix and the said G. A. C., omitted; and the said agreement is therefore silent in regard to the interest on the deferred payments of said purchase money, though it was intended by your oratrix and also by the said C. that the said notes should bear interest, at the legal rate, and that they should be so written. The said agreement, as written, is herewith filed as part of this bill, marked "Exhibit A."

And your oratrix further alleges that the said C. has taken possession of the said house and farm so purchased, and has paid the first payment of $4,500.00 on the purchase thereof.

But the said C., not regarding his said agreement so made with your oratrix, but contriving and intending to deceive and defraud your oratrix in this behalf, has always hitherto delayed and refused to perform his agreement to give his notes bearing interest according to the stipulation entered into with your oratrix, but omitted by mutual mistake as aforesaid in

committing the same to writing; although your oratrix is ready and willing, and has always been ready, and has offered to give and tendered to the said C. a good and sufficient deed for the said property, whenever the said notes bearing interest should be given to your oratrix by the said C. And the said C., amongst other things, pretends that, as the stipulation between him and your oratrix to pay interest on the said notes is not contained in the said written agreement, he is not bound by the said stipulation, and is required only to give notes without interest for the last payments. But your oratrix is advised that this honorable court has the power to reform and rectify said written agreement so defective by omission and mistake, so as to make it conform to the true agreement entered into by your oratrix and the said C., by inserting in it the clause alleged as aforesaid to have been omitted by mistake; and that, when the said agreement is so reformed and rectified, this honorable court has the power of enforcing a specific performance of the contract as reformed and rectified, by compelling the said C. to give his notes bearing interest to your oratrix, in accordance with the rectified agreement in writing.

Your oratrix therefore prays that the said C. may be made defendant to this bill; that the said agreement, as committed to writing, may be reformed and rectified by inserting in it the clause omitted by mistake, so that the notes for the four deferred payments of the purchase money of the said house and farm shall bear interest; that the said C. may be decreed to give his notes bearing interest from the *first* day of *April, 19—*, to your oratrix, in accordance with said rectified instrument of writing, and to accept from your oratrix a good and sufficient conveyance of the said house and farm; and that your oratrix may have such other and further relief as her case may require.

R. C. K.,
By Counsel.[95]

S. T.,
Solicitor for the Plaintiff.

[95] The above form is taken from Mitford & Tyler, Eq. Pl. and Pr., 541. See Hogg, Eq. Princ., §§ 337-347.

No. 153.

§ 1007. To surcharge and falsify the settlement of a personal representative.

[*After the title of the cause as indicated in No. 1.*]

Complaining, sheweth unto Your Honor, your orator, A——— B———, an infant, under the age of twenty-one years, by L——— K———, his next friend, that on the ——— day of ———, 19—, E——— B———, the father of this plaintiff, departed this life intestate; that subsequently thereto the defendant, C——— D———, was appointed and qualified as administrator of his estate.

Your orator says that there came into the hands of said C——— D——— a large amount of personal estate, aggregating the sum of ———; that the said C——— D——— returned an inventory of the estate of the said E——— B——— to the office of the clerk of the county court of said county, an attested copy of which is herewith filed, marked "Exhibit No. 1," and made part of this bill.

Your orator says that said inventory shows only the sum of $4,200 as having come into the hands of the said C——— D——— as such administrator, when, in truth and in fact, there came into the hands of said C——— D———, as the property of the estate of the said E——— B———, not included in said inventory, one note for $500, given by F——— G——— to the said E——— B———; one Government bond for $500, belonging to the estate of the said E——— B———.

Your orator says that on the ——— day of ———, 19—,

"The word 'mistake,' in a bill alleging a contract different from that reduced to writing, and that it was so written by mutual mistake, is the statement of a fact, and not of a conclusion." Smelser v. Pugh, 29 Ind. App. 614, 64 N. E. 943.

"A bill for reformation of a contract, alleging what the real agreement was, and that, by mutual mistake and inadvertence of the parties and the scrivener, the contract was executed, sufficiently shows how the mistake occurred." *Idem.*

For a form of a bill by a grantor to reform a description in a deed, based on Crim v. O'Brien, 69 W. Va. 754, 73 S. E. 271, see 3 Whitehouse, Eq. Prac., 2179.

the said C——— D——— settled his accounts before H——— S———, a commissioner of accounts in and for said county, which settlement was returned to and confirmed by the county court of said county, as will more fully appear from said settlement and report thereof, attested copies of which are herewith filed, marked "Exhibit B" and "Exhibit C," respectively, and made part of this bill; that on the ——— day of ———, 19—, the said C——— D——— made another settlement as such administrator before the same commissioner, which settlement was reported to and confirmed by the said county court, as will more fully and at large appear from said last settlement and the report thereof, attested copies of which are herewith filed, marked as "Exhibit D" and "Exhibit E," respectively, and made part of this bill.

Your orator says that in the said last settlement the said C——— D——— brings out the estate of the said E——— B——— in debt to him, the said C——— D———, in the sum of ——— dollars, when, in truth and in fact, had the said C——— D——— charged himself with the said note and Government bond, which he should have done, there would still be in his hands, as belonging to the said estate, the sum of ——— dollars.

Your orator says that the said C——— D——— is credited with the following items: [*here specify the same*], as having been paid by him on account of the said estate, which he, the said C——— D———, did not pay, and for which he had no vouchers whatever, and which are wholly unsupported by any proof.

Your orator says that your orator is the sole heir-at-law and the only person interested in the accounts of the said C——— D——— as administrator aforesaid; that all the debts of the said C——— D——— have been paid, and that whatever may be in the hands of the said C——— D——— as such administrator should be paid over to your orator.

Your orator now prays that the accounts of said C——— D——— be surcharged and falsified as to the matters herein-

before alleged; that this cause may be referred to a commissioner in chancery to take and report an account as to the particular matters hereinbefore specified and set forth; that your orator may have a decree for any balance in the hands of the said C——— D——— as such administrator; and grant unto your orator such other, further and general relief as to equity may seem meet, and as in duty bound he will ever pray, etc.

Q——— C———, A——— B———,
Solicitor for the Plaintiff. By Counsel.[96]

No. 154.

§ 1008. For specific performance by vendor against vendee.

[*After the usual caption, address and commencement.*]

On the ——— day of ———, 19—, your orator being seized and possessed in fee simple, free of incumbrances of any sort, by perfect title, of a certain tract of land, with the buildings thereon, lying and situate in the county of F———, in the state of ———, about ——— miles east from the court-house of said county, adjoining the lands of X., Y. and Z., and more particularly described as follows: [*here describe the property*]; he contracted in writing to and with one A. B. to sell to the said A. B. the said property for the sum of $———, of which the sum of $——— was to be paid by the said A. B. on the ——— day of ———, 19—, on which day your orator agreed that he would execute and deliver to the said A. B. a good and sufficient deed for the said property, with general warranty and free from liens or incumbrances of any sort; and the residue of the purchase money was agreed to be paid as follows: $——— on the ——— day of ———, 19—, with interest from the ——— day of ———, 19—, and $——— on the ——— day of ———, 19—, with interest from the ——— day of ———, 19—; for which said deferred payments the said A. B. agreed to execute and deliver to your orator his two several

[96] The foregoing bill is constructed from the principles laid down in this work, *ante*, § 140.

bonds for the said sums of money, and payable at the said times, respectively, and to execute a deed of trust on the property sold to secure them.

A copy of the said contract is herewith filed, marked "Exhibit A," and is prayed to be read as a part of this bill.

And your orator further avers that on the ——— day of ———, 19—, the day named in said contract, he tendered to the said A. B. full and complete possession of the premises aforesaid, and at the same time he exhibited to him and offered to deliver to him a good and sufficient deed for the said premises, duly signed and acknowledged by your orator and his wife, and with a covenant of general warranty contained therein: the said land then as now being free from lien or incumbrance of any sort, and the title of your orator thereto being full, complete and unchallenged.

But your orator avers that the said A. B. then and there refused, and has at all times since refused, to accept the said deed, or to pay the said sum of money agreed on in cash, or any part of the same; likewise to execute the bonds or deed of trust as contracted for, or to take possession of the said property.

Wherefore, your orator being remediless, save in a court of equity, and herewith tendering a good and sufficient deed for the said property, duly executed and acknowledged by your orator and his wife, and hereby offering fully to perform all the provisions of his contract with the said A. B., prays that the said A. B. may be compelled on his part to perform and comply with his contract aforesaid; to accept the deed tendered to him; to pay the cash and to execute the bonds and deed of trust contracted for; that the said A. B. may be made a party defendant to this suit; and grant unto your orator such other, further and general relief as to equity may seem meet.

L. K., H. J.,
Solicitor for the Plaintiff. By Counsel.[97]

[97] The foregoing form is taken 2 Bart., Ch. Pr. (2nd Ed.), 1288.

No. 155.

§ 1009. For specific performance by vendee against vendor.

[*After the usual caption, address and commencement.*]

On the ——— day of ———, 19—, one C——— D———, being, or pretending to be, seized and possessed in fee simple of the following described real property, situate, lying and being in the county of ———, in the state of ———, to-wit: [*here describe the premises*] and being so seized, on that day, entered into a written agreement with your orator, for the sale of the same, which said agreement was signed by the said C——— D——— and your orator, and duly delivered to your orator, and by which the said C——— D——— covenanted and agreed for himself, his heirs, executors and administrators, for and in consideration of the sum of ——— dollars, to be paid as hereinafter mentioned, well and truly to convey by a good and sufficient warranty deed, in fee simple, to your orator, his heirs or assigns, the tract or parcel of land above described; and, in consideration whereof, your orator covenanted and agreed to pay the said C——— D———, his heirs, executors, or administrators, the said sum of ——— dollars, in manner following, to-wit: [*here state the manner of payments, as in agreement*]; as by the said agreement, ready to be produced in court, a copy of which is hereto attached and filed, marked "Exhibit A," and made part of this bill, will more fully appear.

Your orator further represents that he has always been willing and ready to comply with the terms of said agreement, on his part to be performed; that on the ——— day of ———, 19—, he applied to the said C——— D——— and offered to pay him the sum of ——— dollars, being the balance then due the said C——— D——— under the said agreement, on his delivering to your orator a sufficient warranty deed for the said premises, according to the said agreement; yet the said C——— D——— refused, and still refuses, to comply with the said agreement on his part; although your orator is, and always has been, ready to pay the said sum of ——— dollars,

and fully to perform his part of the said agreement whenever the said C——— D——— will make and deliver to him a good and sufficient deed for the premises aforesaid.

Your orator therefore prays that the said C——— D——— may be made a party defendant to this bill; that the said defendant may be decreed specifically to perform the said agreement entered into with your orator as aforesaid, and to make a good and sufficient deed to your orator for the said described premises; your orator being ready and willing, and hereby offering, specifically to perform the said agreement on his part, and upon the defendant's making out a good and sufficient title to the said premises and executing a proper conveyance therefor to your orator, pursuant to the terms of said agreement, to pay to the defendant the residue of the purchase money; and that your orator may have such other and further relief as equity may require, and to Your Honor may seem meet, and as in duty bound he will ever pray, etc.

A——— B———,
By Counsel.[98]

E. F.,
Solicitor for the Plaintiff.

No. 156.

§ 1010. For specific performance of parol agreement for sale of land where there has been a part performance.

[*After the usual caption and address.*]

The plaintiff complains and says that the H. C. C. & S. Company is a corporation duly organized and existing under and by virtue of the laws of the state aforesaid; that its principal office and place of business is in the town of H———, in the county aforesaid; that the said company, as the owner in fee of a certain parcel or lot of land and house thereon situate, hereinafter more particularly described, did bargain and sell

[98] This form is taken from Puterbaugh, Ch. Pl. and Pr. (3d Ed.), 393.

the same to the defendant, H. G., for the sum of $———; that said contract of sale was made some time in the year 19—. The plaintiff avers that said defendant, H. G., was put in possession of said lot and premises by the company aforesaid; that said H. G. made valuable improvements thereon [*state the nature of the improvements*] and paid part of the purchase money therefor, amounting, as this plaintiff is informed, to the sum of $———.

The plaintiff further avers that said H. G., finding himself unable to finish paying the purchase money for said property, did some time in the year 19— agree with this plaintiff that if he, this plaintiff, would finish and complete the payment of the purchase money then due and owing said company for said property, the deed therefor should be made to him, this plaintiff, said defendant, H. G., thereby selling and transfering to this plaintiff the equitable interest of said defendant, H. G., in and to said lot and premises.

The plaintiff further avers that, in pursuance of said contract with said H. G., he took possession of said property, has lived in and upon the same ever since in continuous and exclusive possession thereof, and has built an addition to the house located on said land, constructed a smokehouse thereon and made other valuable and permanent improvements and repairs thereon, paid the taxes and charges against said property and has paid said company about the sum of $500 in full and complete satisfaction and discharge of the purchase money due therefor.

The plaintiff avers that said company is now ready and willing to make, execute, acknowledge and deliver to this plaintiff an apt and proper deed conveying said property to this plaintiff; but plaintiff charges that said H. G. refuses to permit said company to execute said deed to him, this plaintiff, in accordance with the contract between said H. G. and this plaintiff.

The plaintiff further says that he has performed in all respects his part of the said contract; but the said defendant, H. G., refuses and declines to perform his part thereof.

The plaintiff further says that said lot is situated in or near ———, in ——— county, West Virginia, and is bounded as follows: [*here describe lot*].

The plaintiff therefore prays that said H. G. and H. C. C. & S. Company be made parties defendant to this suit, and that said defendants be required to execute and deliver to this plaintiff a proper deed conveying to this plaintiff said lot and premises aforesaid.

He asks such other, further and general relief as the court may see fit to grant. And as in duty bound he will ever pray. etc.

M——— G———,
By Counsel.[99]

M——— & H———,
Solicitors for the Plaintiff.

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§ 1011. By surety to be subrogated to rights of creditor.

[*After the usual caption and address.*]

Your orator, A. B., respectfully represents that on the ——— day of ———, 19—, one C. D., being indebted to one E. F. in the sum of ——— dollars, for so much money by the said E. F. then loaned to the said C. D., the said C. D. and your orator, as his security, made and delivered to the said E. F. a promissory note of that date, and thereby promised to pay to the said E. F. the said sum of money in *one year* after the date thereof, with interest thereon at the rate of *six* per cent. per annum, which said promissory note was signed by the said C. D. as principal thereto, and by your orator as security for the said C. D., and without any consideration moving from the said C. D. or E. F. to your orator.

Your orator further represents that further to secure payment of the principal sum and interest above mentioned the said C. D. and D. D., his wife, on the ——— day of ———, 19—, by their mortgage deed of that date, conveyed to the said E. F., in fee simple, the following described real estate,

[99] The above form is substantially taken from the case of Gallagher v. Gallagher, 31 W. Va. 9, 5 S. E. 297.

situate in the said county of ———, to-wit: [*here describe the premises*]; subject, however, to a condition of defeasance upon the payment of the said principal sum and interest aforesaid, according to the tenor and effect of the said promissory note, which said deed was on the ——— day of ———, 19—, duly acknowledged, and afterwards, on the ——— day of ———, 19—, filed for record in the office of the clerk of the county court of ——— county, and duly recorded in Deed Book No. ———, at page ———, as will more fully appear from an attested copy of said deed herewith filed as "Exhibit A," and made part of this bill.

Your orator further represents that soon after the execution and delivery of the said promissory note and mortgage deed, and before the said note became due, the said C. D. became wholly insolvent, and unable to pay the amount due on the said promissory note.

Your orator further represents that after the maturity of the said promissory note, on the ——— day of ———, 19—, the said E. F., the holder thereof, demanded of your orator, as security aforesaid, the amount due on said note, and your orator was compelled to and did pay to the said E. F. the full amount due thereon, to-wit: the sum of ——— dollars; which said payment was indorsed upon said note by the said E. F., as will more fully appear from the said promissory note, now held by your orator, and the endorsement thereon, ready to be produced upon the hearing of this cause; and a copy of the same is hereto attached, marked "Exhibit B," and made a part of this bill of complaint.

Your orator further represents that, by reason of the insolvency of the said C. D., your orator is in danger of losing the amount so paid by him as security as aforesaid, and that in justice and in equity your orator is entitled to be subrogated to all the security, including said mortgage lien, held by the said E. F.

Your orator further represents, upon information and belief, that one G. H. and one J. K. have or claim some interest in the mortgaged property aforesaid, as purchasers, judgment

creditors or otherwise, the precise nature of which is unknown to your orator, but such interests, if any there be, have accrued since, and are subject to, the rights of your orator, under the mortgage aforesaid.

Your orator therefore prays that the said C. D., D. D., E. F., G. H. and J. K. be made parties defendant to this bill; that upon the hearing thereof, the court will decree that your orator be subrogated to all the rights and benefits of the said mortgage lien possessed by the said E. F.; that an account may be taken in this behalf, by or under the direction of the court, of the amount due your orator, as aforesaid; that the defendant, C. D., may be decreed to pay to your orator whatever sum shall appear to be due to him upon the taking of said account, together with the costs of this proceeding, by a short day to be fixed by the court; and that in default of such payment, the said premises may be sold, as the court shall direct, to satisfy the amount due your orator, and the costs; and that your orator may have such other or further relief in the premises as equity may require and to the court shall seem meet.

A——— B———,
By Counsel.[100]

L——— M———,
Solicitor for the Plaintiff.

No. 158.

§ 1012. For the removal of a trustee because of misconduct in his management of the trust fund, for an injunction and a receiver.

[*After the usual caption or title.*]

Your complainants, A. B., B. B., the wife of A. B., and C. B., the daughter and only child of A. B. and B. B., respectfully represent unto Your Honor that on the ——— day of ———, 19—, a certain deed of conveyance of that date was

[100] The foregoing form is taken from Puterbaugh, Ch. Pl. and Pr. (3d Ed.), 778.

executed between your complainants A. B. and B. B., his wife, of the one part, and C. D. and E. F., the defendants hereinafter named, of the other part, which said deed is in the words and figures and to the purport following, that is to say: [*here set out copy of deed verbatim*]; as by the said deed, ready to be produced in court, will appear.

Your complainants further represent that the defendant, C. D., has principally acted in the trust of the said deed, and has, by virtue thereof, from time to time, received considerable sums of money and other effects, but he has applied only a small part thereof upon the trusts of the said deed, and has applied and converted the residue thereof to his own use; and, in particular, the said C. D. has, within a few months past, received a considerable sum of money from the estate and effects of the said B. B. and C. B., the whole of which he has applied to his own use.

Your complainants further represent that they have repeatedly applied to the defendants for an account of the said trust property received and possessed by them, and of their application thereof. And your complainants well hoped that the defendants would have complied with such reasonable request, as in equity they ought to have done. But now so it is, the defendants combining and confederating and contriving so to wrong and injure your complainants in the premises, absolutely refuse to comply with such requests; and pretend that the trust property and effects possessed and received by them were to an inconsiderable amount, and that they have duly applied the same upon the trusts mentioned in said deed. Whereas your complainants charge the contrary of such pretenses to be the truth; and that so it would appear if the defendants would set forth, as they ought to do, a full and true account of all and every the said trust property and effects which they have respectively possessed and received, and of their application thereof.

Your complainants further represent that the defendant, C. D., threatens and intends to use other parts of the said

trust property, and to apply the same to his own use, and will do so unless he is restrained therefrom by the injunction of this court; that both said defendants ought to be removed from being trustees under said deed, and that some other person or persons ought to be appointed by this court, as such trustees in their place and stead; and that in the meantime some proper person ought to be appointed to receive, take charge of and collect the said trust property.

Your complainants therefore pray that the said C. D. and E. F. be made parties defendant to this bill, and be required to make full and direct answer to the same; and set forth a true and perfect account in items of all the trust funds and effects received by them, respectively, by virtue of the said deed, and of their application thereof; and that upon the hearing thereof an account may be taken of all and every the said trust property and effects, which have, or but for their wilful default or neglect might have, been received by them, or either of them, or by any other person or persons, by their or either of their orders, or to their or either of their use; and also an account of their application thereof; and that the defendants may respectively be decreed to pay what shall appear to be due from them upon such account; and that the defendants may be removed from being trustees under the said deed; and that two other persons may be appointed trustees under the said deed in their place and stead; and that in the meantime some proper person may be appointed to receive and collect the said trust estate and effects; and that your complainants may have such other and further relief in the premises as equity may require and to Your Honor shall seem meet.

A. B., B. B. and C. B.,
By Counsel.[101]

G. H. K.,
Solicitor for the Plaintiffs.

[101] The foregoing form will be found in Puterbaugh, Ch. Pl. and Pr. (3d Ed.), p. 694.

For form of a bill to remove a trustee under a deed of assignment, based on Wagner v. Coen, 41 W. Va. 351, 23 S. E. 735, see 3 Whitehouse, Eq. Prac., 2137.

No. 159.

§ 1013. By a trustee to obtain the advice of the court touching his duties and for an auditing of his accounts.

[*After the usual caption and commencement.*]

On the ——— day of ———, 19—, one A——— B———, desiring to make voluntary settlement in trust of the bulk of his property in contemplation of marriage, by his deed of said date duly executed and acknowledged, sold, transferred and conveyed to the plaintiffs as joint tenants, to them and the survivor of them, the following described real and personal property: [*here describe the property*], upon the following conditions: [*state the terms of the trust*].

For the accommodation of the said B——— and at his solicitation, the defendants accepted the said conveyance upon the aforesaid trust, and said deed was duly delivered by said A——— B——— to the plaintiffs, and admitted to record in the office of the clerk of the county court of ——— county, in the state of ———, in Deed Book No. ———, at page ———, an attested copy of which deed is herewith filed as "Exhibit A," and made a part of this bill.

On the ——— day of ———, 19—, said A——— B——— married C——— D———, who is now living, and there have been born lawful issue of said marriage as follows: [*here set out the names and ages of the children*].

Plaintiffs have held and managed the property conveyed by said deed ever since the delivery of the same, and have duly paid over to said A——— B——— the net income arising upon said trust as provided in said deed.

The plaintiffs have sold part of the property conveyed to them in said deed, and have reinvested the proceeds thereof in other property for the benefit of said trust, pursuant to the powers given them in said deed.

There have come into plaintiffs' hands and are now held by the plaintiffs as a part of said trust property six hundred and seventy-eight shares of the capital stock of the Hartford Steel Manufacturing Company, and forty-two shares of the capital

stock of the Union Copper Company, which companies are duly incorporated under the laws of the state of ———.

Said stocks have thus far proved, and at present continue to be, profitable investments, and the plaintiffs have held and now hold the same as such trustees with the knowledge and assent of said A——— B———, and neither said A——— B——— nor the plaintiffs know of any other securities which, in their judgment, would probably produce a greater net income with greater safety and certainty; but the plaintiffs are in doubt and are unwilling longer to hold so large an amount of said stocks without the advice and protection of a decree of a proper court.

[*Set forth a full statement of the proceedings, investments and disbursements of the trustees from the commencement of the trust.*]

Ever since accepting said trust the plaintiffs have rendered frequent accounts of their management of said trust and of the receipts and expenditures on account thereof to said A——— B———, and he has approved the same; but inasmuch as said trust is necessarily of very long duration, and the rights of said minor children born, or that may be hereafter born, are involved in the administration of said trust, as well as the rights of his wife, the plaintiffs feel it to be their right and duty to ask the court to examine into their administration of said trust from the commencement thereof, their sales and purchases, investments and reinvestments, as respects the principal of said trust fund, and their receipts, charges and disbursements on account of the income thereof, and to pass upon the propriety and correctness of their said doings and accounts, and to make a complete settlement to the date of the decree of all matters between the plaintiffs and the parties interested.

The value of the trust property now in the hands of the plaintiffs is about $———, and is situate in the state of ———, and said A——— B——— has, since the acceptance of said trust by plaintiffs removed out of this state, and now resides with his wife and children in the city of ———, in the state of ———.

Plaintiff therefore prays that the court will advise and order whether they may or shall hereafter hold as part of said trust property said stocks in said manufacturing companies or any part thereof; that the court will examine into the administration of said trust by the plaintiffs from the commencement down to the time of such examination, including all their sales and purchases, investments and reinvestments, as respects the principal of said trust fund, and all other receipts, charges and disbursements on account of the income thereof; and that the court will pass upon the propriety and correctness of the said doings and accounts, and make a complete settlement up to date of decree of all said matters as between the plaintiffs and the parties interested in said trust; and grant unto plaintiff such other further and general relief as to equity may seem meet, as in duty bound they will ever pray, etc.

M——— L———
and O——— P———,
By Counsel.[102]

C——— J——— H———,
Solicitor for the Plaintiffs.

No. 160.

§ 1014. For the establishment and enforcement of a trust.

[*After the usual caption and commencement.*]

On the ——— day of ———, 19—, plaintiff employed the defendant as his agent to purchase for him the following described real estate: [*here describe the same; or* such real estate as the defendant might in his judgment deem advisable to purchase as an investment], and furnished him for said purpose the sum of ——— dollars.

The defendant accepted such employment and as such agent on the ——— day of ———, 19—, purchased said real estate, and paid therefor of plaintiff's money the sum of ——— dollars.

[102] The foregoing form is based upon a similar form in 2 Thornton, Ind. Pr. Forms, 581.

The defendant, without the knowledge or consent of the said plaintiff, took the deed of conveyance for said real estate in his, defendant's, own name.

On the ——— day of ———, 19—, plaintiff demanded of said defendant an accounting and payment of said money, and a deed to plaintiff for said real estate, all of which was refused by said defendant.

Plaintiff therefore prays that the defendant be compelled to account to him, and that he have a decree against the said defendant for ——— dollars, residue of said sum of money placed in the hands of defendant as aforesaid, by this plaintiff; that defendant be required to convey said real estate to the plaintiff, or upon his failure so to do, that a special commissioner be appointed for that purpose; and grant unto this plaintiff such other further and general relief as to equity may seem meet, and as in duty bound he will ever pray, etc.

A——— B———,
By Counsel.[103]

J——— W———C———,
Solicitor for the Plaintiff.

No. 161.

§ 1015. To set aside a will—General form.

[*After the usual caption and commencement.*]

Your complainant is one of the children and heirs-at-law and distributees of Robert B., who recently departed this life, possessed of real and personal property. The other children, heirs-at-law and distributees of Robert B., are Anna B., Thomas B. and William B. Your complainant believes and so avers that the said Robert B. died intestate. Since his death a paper-writing, purporting to be his last will and testament, has been admitted to probate in this court [*or* in the ——— court of ———], whereby he gives the chief part of his prop-

[103] The above form is taken from 2 Thornton, Ind. Pr. Forms, 1580. See 3 Whitehouse, Eq. Prac., 2139, for form of bill to enforce an express trust, based on Ludwick v. Johnson, 67 W. Va. 499, 68 S. E. 117.

erty to one Susan S., and, after that, the residue of his property to his children. The order admitting the said paper to probate was made on the ——— day of ———, 19—. An attested copy of the said paper is herewith filed, marked "Exhibit A," and made part of this bill. Marcellus M., named as executor of the said paper-writing, has declined to qualify as such executor. Your complainant alleges and charges that the paper-writing aforesaid, of which probate has been received, is not the will of the decedent, Robert B.

In tender consideration whereof, and forasmuch, etc., your complainant prays that the said Susan S., Anna B., Thomas B. and William B. may be made parties to this bill and required to answer the same, and this merely as a step or part of this proceeding to obtain a trial before a jury; that proper process may issue; that an issue *devisavit vel non* be made up and tried by a jury at the bar of this court, to ascertain and try whether the said paper-writing, admitted to probate as aforesaid, is or is not the true last will and testament of the said Robert B.; that the said probate be set aside; that the said paper-writing be declared and decreed not to be the last will and testament of the said Robert B.; and that all such other, further and general relief may be afforded your complainant as the nature of his case may demand, or to equity shall seem meet. And your complainant will ever pray, etc.

A. B.,
By Counsel.[104]

J. Z.,
Solicitor for the Plaintiff.

No. 162.

§ 1016. To set aside a will on the ground of undue influence and mental incapacity.

[*After the usual caption.*]

The plaintiffs complain and say that on the ——— day of ———, 19—. J. M. B. departed this life, leaving him surviv-

[104] The above form is taken from 2 Bart., Ch. Pr. (2nd Ed.), p. 1298.

ing the plaintiffs, who are his children by his first wife, who long ago departed this life; also the defendants, M. B. B., as his widow, the said E. B., S. B. and T. B., who are his children by the said M. B. B., the decedent's second wife, and the said parties named as his children are his sole heirs-at-law.

The plaintiffs further say that at the time the said J. M. B. departed this life he owed no debts, and owned and possessed a large and valuable estate, consisting of real and personal property, amounting in value to about the sum of $75,000.

The plaintiffs further say that on the ——— day of ———, 19—, there was admitted to probate in the office of the clerk of the county court of the said county of M———, a paper-writing purporting to bear date on ——— ———, 19—, and which purports to be the last will and testament of the said J. M. B., deceased, all of which will more fully and at large appear from said paper-writing itself, together with the order of probate thereof, attested copies of which are herewith filed, marked "Exhibit No. 1," and made part of this bill.

The said paper-writing purports to contain devises and bequests to the said M. B. B., E. B., S. B. and T. B., T. R. B., G. B. B., V. V., M. E. J., W. S. B., Z. T. B., F. M. B., J. and M. B., as by reference to the said writing will more fully and at large appear.

These plaintiffs further say that the devises and bequests to said T. R. B., G. B. B. and V. V. are quite small and insignificant when compared with what they should have and would take under the law of descents and distributions as children of the said J. M. B., but for said paper-writing; and the devises and bequests to said M. E. J., W. S. B., Z. T. B. and F. M. B. are barely nominal, so small are they and each of them, when compared with what they and each of them should receive under the law of descents as his children; and the residue of said estate, and the principal part and the bulk thereof is given by said writing to the said M. B. B. and her three children, the said E. B., S. B. and T. B., infant defend-

ants as aforesaid, as by reference being had to said paper will more fully appear.

And the said paper also purports to contain a devise of a small piece of real estate to said J. M. B., and no provision at all is made in said writing for the said M. F. B.

These plaintiffs further say that subsequently, on the ——— day of ———, 19—, and about the last of *March* in that year, the said M. B. B. was adjudged a lunatic; and on the ——— day of ———, 19—, the said Y. X. was appointed a committee of said M. B. B., by the county court [*or whatever court it may be*] of the said county of M———, and gave bond and qualified as such committee, which will more fully and at large appear from the order of said county court making such appointment, an attested copy of which is herewith filed, marked "Exhibit No. 2," and made part of this bill.

These plaintiffs further say that on the ——— day of ———, 19—, the said U. S. F. was appointed administrator, with the will annexed, of the estate of the said J. M. B., deceased, by the clerk of the said county court in the vacation thereof, which appointment was afterwards confirmed by the said court at its next regular session, as will more fully appear from the order of such appointment made in vacation of the county court as aforesaid in "Exhibit No. 1," hereinbefore filed as an exhibit to this bill.

These plaintiffs further say that at the time when said paper-writing was made, purporting to be the will of the said J. M. B., deceased, the alleged testator, he, the said J. M. B., was afflicted with bodily and mental infirmity, and with weakness of mind and impaired memory to such an extent that the said alleged testator was not of sound or disposing mind, was incapable of understanding the extent and variety of his property, and was incapable of holding in mind the objects of his affection so as to make his devises and bequests conform to his true intent and desire.

Plaintiffs say that on or about the ——— day of ———, 19—, the said J. M. B., who had been a widower for some years, married the said M. B. B., who was then *28* years of age, and more than *30* years his junior; that soon after the marriage of said M. B. B. to the said J. M. B., she commenced her entreaties and importunities with the said J. M. B. to influence him to transfer his property to her; that these importunities and entreaties continued with increased vigor from that time up to the said ——— day of ———, 19—, at which time and long prior thereto said J. M. B. was so worn out with said importunities and entreaties that his will had given away and yielded thereto, and on the said last-named date he was entirely under the influence of the said M. B. B., his wife, and subject to her will and control; that the influence exerted over the said J. M. B., during the period aforesaid by the said M. B. B., his wife, in order to procure him to transfer his property to her and her children, was so strong and so great as to utterly destroy the peace of mind and overthrow the free agency of the said J. M. B., and to substitute her will for his. And so these plaintiffs say that the said paper-writing purporting to be the will of the said J. M. B., deceased, was procured, obtained and made through and by the said unlawful and undue influence of the said M. B. B. operating upon the mind of the said testator at the time of its execution.

These plaintiffs therefore further say that the said paper-writing purporting to bear date on the ——— day of ———, 19—, and admitted to probate on the ——— day of ———, 19—, by the county court of M——— county, West Virginia, and purporting to be the last will and testament of J. M. B., deceased, is not the last will and testament of J. M. B., deceased, nor is any part thereof the last will and testament of the said J. M. B., deceased.

Plaintiffs therefore pray that the said paper-writing be declared not to be the will of said J. M. B., deceased, and grant unto plaintiffs such other, further and general relief as the law

in the premises may authorize and as in duty bound they will ever pray, etc.

Z. T. B., W. S. B., T. R. B.,
M. F. B., F. M. B., G. B.
B., M. E. J. and V. V.,
By Counsel.[105]

W. P.,
Solicitor for the Plaintiffs.

No. 163.

§ 1017. To construe a will.

[*After the usual caption.*]

The plaintiff complains and says that on the ——— day of ———, 19—, one E——— F——— died seized of an estate of the estimated value of ——— dollars, leaving a will duly attested, which, on the ——— day of ———, 19—, was duly admitted to probate in the office of the clerk of the county court of ——— county, state of ———, as will more fully appear from the order of probate thereof, a copy of which is herewith filed as "Exhibit No. 1," and made part of this bill.

Plaintiff further says that the terms and provisions of said will will more fully and at large appear from said will, an attested copy of which is herewith filed, marked "Exhibit No. 2," and made part of this bill.

Plaintiff further says that plaintiff, as executor of said will, has paid all lawful claims against said estate, and all legacies provided for in said will, and on the ——— day of ———, 19—, duly rendered an account of all his proceedings in said settlement of said estate to the ——— court of the state of ———, which accounts and settlement were duly approved and confirmed by said court.

Plaintiff further says that after the payment of the legal claims against said estate, and of the legacies given by said

[105] The above form is drawn from the general principles underlying the law authorizing any instrument to be set aside upon the ground of undue influence and mental incapacity.

will, and of the expenses of the settlement of said estate, there remains in the hands of the plaintiff no residuary estate whatsoever applicable to the purposes of the trust provided for in the sixteenth section of said will, except two parcels of land with the buildings thereon in the sixteenth section of said will specifically described which are of the value of not less than ——— dollars.

Plaintiff further says that no church edifice has been erected on either of the tracts of land in the sixteenth section of said will set apart for that purpose, nor has any application ever been made to the plaintiff for the occupation or use of said premises for the erection of said church edifice, by any society or ecclesiastical organization for the purpose of availing themselves of the provisions of the trust by said sixteenth section intended to be created.

Plaintiff further says that by reason of the failure of the residuary estate as contemplated by the said sixteenth section, the plaintiff is without funds or the means of raising them to keep the house named in said sixteenth section properly insured, or to make the repairs upon said house necessary to keep it in proper and tenantable condition, or to pay the taxes lawfully assessed against the premises, or the assessments properly laid thereon for local and municipal purposes, and the taxes already assessed against said premises have remained unpaid for a series of years and now amount to $———, bearing interest at the rate of ——— per cent.

Plaintiff further says that ——— ——— and ——— ———, named in the sixteenth section, have both died since the death of said testatrix, and their interests under the provisions of the said will have ceased.

Plaintiff further says that the following persons claim to have some interest in or title to the premises described in said sixteenth section of said will, to-wit: [*naming them*], as next of kin and heirs of said ——— ——— [*testatrix*], deceased.

Plaintiff further says that various questions have arisen and various claims have been made by the different persons herein-

before named relative to the construction, validity and legal effect of certain of the provisions, devises and trusts contained in said will, among which are the following:

Whether any legal effect can be given to any part of the sixteenth section of said will, and if so, what; whether all or any part of said section is or is not void; and whether any portion of the scheme contemplated by said section can be made legally operative;

Whether the trust made, or which it was attempted to make, in said section is valid and operative, and capable of being carried out in any legal manner, and if so, how; whether the trust estate thereby created, or which it was attempted to create, is now a valid and subsisting estate; and whether the provision for accumulation therein contained is a legal and valid provision, and if not, whether other provisions of said section are thereby rendered inoperative and void;

Whether the trust which it was sought to create by said section is or is not void for uncertainty, indefiniteness and a failure of the object of the testatrix's bounty; and,

In the event of said trust being adjudged to be inoperative or invalid, or to have failed, then to whom, and in what proportions, and in what manner, the tracts of land mentioned are to be conveyed, or whether such tracts, or either of them, revert, or in right or in law belong, to the heirs at law of the testatrix, and who such heirs are.

The plaintiff is ready and willing to convey said estate as the same shall appear of right to belong, but he is in doubt as to said several questions, and as to the true construction of the clauses and paragraphs of said will to which said questions relate; and by reason of the conflicting claims of the various parties in interest and of the uncertainty and ambiguity of the various clauses of said will, he is exposed to sundry suits by said claimants, and to loss and damage therefrom.

The plaintiff therefore prays that he may have the advice and protection of the court in giving a construction to the several clauses and provisions of said will in respect to which

have arisen said various claims and questions as above specified and set forth; that he may have a decree entered in this cause adjudicating and settling the construction of said will, and directing the plaintiff in what manner he shall carry its trusts into execution, so that he may execute the same properly and with safety to himself; and that he may have such other and further relief as the court may see fit to grant.

A——— B———,
Executor of the Estate of E——— F——— Deceased,
By Counsel.[106]

J——— H——— H———,
Solicitor for the Plaintiff.

No. 164.

§ 1018. To perpetuate testimony.

[*After the usual caption and commencement.*]

On the ——— day of ———, 19—, he entered into a certain contract with A——— B———, as follows: [*here state the contract, or if the suit be not on contract state the case*].

But the said A——— B——— wholly broke and failed to perform the contract in this, that he did not [*now state the case, or if it be not on contract substitute the true narrative of the case, substituting the same in place of the words "wholly broke and failed," and the words following*].

Nevertheless, although your orator hath just cause of complaint against the said A——— B———, because of his conduct and behavior in the premises, and at the proper time proposes to institute suit against the said A——— B———, yet at this time your orator is prevented from instituting suit against the said A——— B———, for the following reasons: [*here state such reasons as in law may be good and sufficient why suit may not be instituted at present*].

[106] As to the parties to a bill of this sort, see *ante*, § 86. This form is founded upon one appearing in 2 Thornton, Ind. Pr. Forms, 1605-7.

And your orator avers that in order to maintain his suit, when he shall be at liberty to institute the same, the testimony of X——— L——— is absolutely essential to him, but the said X——— L——— is a very aged person and in infirm health (or is about to leave the state), and your orator fears that should his testimony not be taken at once, he may die or be in such feebleness of body or mind (or will have left the state), as that his testimony can not be taken, if the taking thereof shall be postponed until the said suit shall have been brought and matured for the taking of testimony.

Wherefore, your orator prays that the said A——— B——— be made a party to this suit and be compelled to answer this bill, but not on oath, the oath being hereby expressly waived; that your orator be allowed, upon proper notice to the said A——— B———, to take the deposition of X——— L———, and that the same be perpetuated by decree of this court in this cause to be used and read in such suit as your orator may hereafter institute against the said A——— B——— upon the cause of action described in this bill.

C——— D———,

W——— P——— K———, By Counsel.[107]

Solicitor for the Plaintiff.

[*Verify the bill by affidavit, following the form No. 259, or No. 262, depending upon the fact as to the state in which the suit is brought.*]

No. 165.

§ 1019. To take testimony de bene esse.

[*After the usual caption and commencement.*]

An action at law is now pending in the circuit court of ——— county, in said state, wherein your orator is plaintiff, and said C——— D——— is defendant [*or the reverse*], touching and concerning [*here describe the cause of action*], which

[107] The above form is taken from 2 Bart., Ch. Pr. (2nd Ed.), 1290.

has not yet been committed to a jury; and your orator further shows, that one E——— F———, of the age of seventy years or upwards (or a person of infirm health, or laboring under a certain disease, or who is about to depart out of the jurisdiction of the court, or who is the sole witness to the fact of ———), so that his testimony is in danger of being lost to your orator at the said trial, by reason of death (or absence), is a material and important witness at said trial for your orator, inasmuch as the said E——— F——— is acquainted with the fact [*here state the expected evidence of the witness; or,* inasmuch as the said E——— F——— is the sole person who has knowledge of the fact of ———], which fact it is material and neeessary for your orator to prove on the trial of the said action at law.

In tender consideration whereof your orator prays that the said C——— D——— may be made a party defendant to this suit; that your orator may be at liberty to take the testimony of the said witness E——— F——— *de bene esse;* that your orator have such other further and general relief as to equity may seem meet, and as in duty bound he will ever pray, etc.

A——— B———,

I——— J———, By Counsel.

Solicitor for the Plaintiff.

[*Append affidavit of the circumstances under which the evidence is in danger of being lost.*]

CHAPTER XXXIX

BILLS NOT ORIGINAL

§ 1020. Amended or supplemental bill.
§ 1021. Amended or supplemental bill.—Another form.
§ 1022. Amended or supplemental bill.—A further form.
§ 1023. Amended bill.—Another form, and one often used in practice.
§ 1024. The amendment to a bill.
§ 1025. Of revivor by the original complainant against the executor of the original defendant, who had answered the original bill before his death.
§ 1026. A cross-bill.
§ 1027. A cross-bill in the nature of a plea *puis darrein* continuance.
§ 1028. Of review upon errors in law.
§ 1029. Of review on discovery of new matter.

No. 166.

§ 1020. Amended or supplemental bill.

[*After the style of the cause and court in which pending as in No. 1.*]

The amended (or supplemental) bill of complaint of A. B. humbly shows, that heretofore he filed his bill of complaint in this court, against a certain C. D., praying, amongst other things, for a sale of certain premises mortgaged by the said C. D. to your orator, as in said bill is particularly set forth, to which bill the defendant answered, and other proceedings were had, as by the same proceedings now in this court, will appear.

And your orator has lately discovered, and now charges, by way of amendment (or supplement) to his aforesaid bill of complaint, that the said C. D., subsequent to the date of his aforesaid mortgage to your orator, conveyed or assigned all his remaining interest or equity of redemption in said premises unto one E. F., of said ———, who is therefore a necessary party to this suit.

Your orator, therefore, prays that the said C. D. may answer this amended bill, and that the said E. F. may answer as well the matters charged in the said original bill of complaint as in this amended bill, and that your orator may have such relief against them as is prayed for in his original bill against the said C. D.

A——— B———,
By Counsel.[1]

M. N.,
Solicitor for the Plaintiff.

No. 167.

§ 1021. Amended or supplemental bill—Another form.

[*After style of cause as indicated in No. 1.*]

The amended and supplemental bill of your complainant, R. B., respectfully sheweth to the court that he heretofore exhibited in this court his original bill of complaint against [*here name the defendants, setting forth original bill and proceedings, after which state the matter of amendment and supplemental matter*].

Your complainant therefore prays that the said M. M. and L. L. may severally answer all and every the matters and things herein charged by way of amendment and supplement, and that they may discover and set forth [*here add interrogatories*]. And your complainant prays that he may have full and general relief in the premises, such as the nature of his case may require. And your orator will ever pray, etc.

R. B.,
By Counsel.[2]

H. M.,
Solicitor for the Plaintiff.

[1] This form is taken from Mitford & Tyler, Pl. and Pr. in Eq., 554.

An amended bill need only state so much of the original bill as is necessary to introduce and make intelligible the new matter. Puterbaugh, Ch. Pl. and Pr. (3d Ed.), 205.

[2] The above form is taken from 2 Bart., Ch. Pr. (2nd Ed.), 1294.

No. 168.

§ 1022. Amended or supplemental bill—A further form.

[*After style of cause as indicated in No. 1 and commencement as in No. 17.*]

I. On the *ninth* day of *July, 1890,* he filed his original bill in Your Honor's said court against the said defendant, *Richard Roe,* alleging, among other things, that [*here state briefly the material allegations of the original bill*]. In said original bill complainant prayed that [*here set forth the substance of the prayers*]. All of which allegations and prayers will fully appear by reference to said original bill.

II. And now, by leave of Your Honor, complainant brings this amended bill into Your Honor's said court, and shows to the court that [*here set out the new matters, new parties, and such other additional, or amendatory, or explanatory matters, as the amended bill is intended to set forth*].

III. The complainant now prays:

First, that proper process issue to bring [*any new parties, made by the amended bill, before the court*];

Second, that all the defendants to this amended bill be required to answer it, but not on oath. [*If an answer from any defendant is unnecessary, so state and except him from answering*];

Third, that complainant have [*the particular relief he seeks by his amended bill, if any, specifying it*];

Fourth, that complainant may have, also, general relief.

J——— D———,
By Counsel.[3]

L——— S———,
Solicitor for the Plaintiff.

[3] It must not be forgotten or overlooked that when the original bill is verified the amended or supplemental bill must also be verified. "When a statute requires all pleadings to be verified by the party in whose name they are filed (§ 8, c. 64 [§ 3643] Code Supp. 1918), an amendment of a pleading, especially if material and necessary to confer jurisdiction, must be verified, and, if not verified, will be disregarded." Jennings v. McDougle, 83 W. Va. 186, 98 S. E. 162.

And this requirement can not be evaded by embodying the matter of amendment in a court order. *Idem.*

The foregoing form is taken from Gibs., Suit in Ch., § 645.

No. 169.

§ 1023. Amended bill—Another form, and one often used in practice.

The amended and supplemental bill of complaint of A——— B——— against C——— D———, filed in the circuit court of ——— county, in the state of ———.

The plaintiff by way of amendment and supplement to his original bill [*or whatever bill or bills it may be*] in this cause, says that heretofore he filed his bill of complaint in this court against C——— D———, to which bill of complaint he hereby refers, and asks that it be taken and read in connection with this, his amended and supplemental bill to the same extent, and with the same effect as if the same were herein fully set forth; that the said defendant filed his answer to said bill, and other proceedings were thereon had, as by the same proceedings in this court, reference being had thereto, will fully appear.

And this plaintiff, further complaining, says that he has lately discovered and now charges by way of amendment and supplement of his said bill of complaint that [*here insert the matters of amendment and supplement to be embodied in the amended and supplemental bill*]; that it will appear from the amendment here made that the said E——— F——— and G——— D——— should be made parties to this suit in order to complete the determination of the matters in controversy herein involved. [*This last allegation as to new parties is only to be made, of course, when the amendment requires new defendants.*]

Plaintiff therefore prays that the said C——— D——— may answer this amended and supplemental bill; that the said E——— F——— and C——— D——— may answer as well the matters charged in the original bill of complaint as in this amended and supplemental bill; and that this plaintiff may have such relief as is prayed for in his original bill.

J——— C———,
Solicitor for the Plaintiff.

A——— B———,
By Counsel.

No. 170.

§ 1024. The amendment to a bill.

[*After the title of the cause.*]

An amendment to the bill of complaint in this cause made by leave of, and in pursuance of an order of the court, entered herein on the ——— day of ———, 19—.

First. In the third line from the top of the second folio of the bill, after the word "and," interline, "to-wit, on the ——— day of ———, 19—."

Second. After the word "time," in the tenth line from the bottom of the sixth folio, insert the words following: [*Here insert the additional matter proposed.*]

Third. Strike out the words "did convey," in the fourth line from the top of the eleventh folio, and insert in lieu thereof the following: "Was about to convey."

Fourth. Add the name of "E——— F———" as a defendant, in the second line from the bottom of the fourteenth folio, after the word "and."

A——— B———,
J——— H——— W———, By Counsel.
Solicitor for the Plaintiff.[4]

No. 171.

§ 1025. Of revivor by the original complainant, against the executor of the original defendant, who had answered the original bill before his death.

[*After the title of the cause.*]

The bill of complaint of A. B. humbly shows that heretofore he filed his bill of complaint in this court against C. D., praying, amongst other things [*here insert prayer of original bill in such manner as to show the right to revive against the executor of the deceased defendant*]. To which said bill the said de-

[4] See Puterbaugh, Ch. Pl. and Pr. (3d Ed.). 203, whence this form is taken.

fendant answered, and other proceedings were had, as by the same proceedings now remaining in this court will appear.

And your orator further charges that before the said cause was brought on to a hearing the said C. D. departed this life, leaving a last will and testament in writing, duly executed in his lifetime, of which he appointed E. F., of said county, executor, who, since the death of the said C. D., has duly proved the same and obtained letters testamentary thereon, and has possessed himself of assets of his testator sufficient to answer the demands of your orator against the said testator, as stated in his aforesaid original bill.

And your orator is advised that the said suit having abated by the death of the said C. D., he is entitled to have the same revived against the said E. F., as executor aforesaid, and restored to the condition in which it was at the death of the said C. D.

Your orator therefore prays that the said E. F. as such executor may be made a party defendant to this bill, as well, also, as to said original bill, and may answer the premises, and may either admit assets of his testator in his hands to satisfy your orator's aforesaid demand, or set forth a full and particular account of the personal estate of his testator which has come to his hands, and of the application thereof; that the said suit may be revived against the said E. F. and be restored to the same condition that it was in at the time of the death of the said C. D.; and, in case the said E. F. shall not admit assets of his testator in his hands to satisfy your orator's aforesaid demand, that an account may be taken, under the direction of this court, of the estate and effects of the said testator, received by or for the use of the said E. F. as executor aforesaid, and of the application thereof; and grant to your orator such other relief as the nature of this case may require.

J. L.,
Solicitor for the Plaintiff.

A——— B———,
By Counsel.[5]

[5] The foregoing form is taken from Mitford & Tyler, Pl. and Pr. in Eq., 554.

No. 172.

§ 1026. A cross-bill.

[*After the title of the cause.*]

Humbly complaining, showeth unto Your Honor, your orator, J. H. (administrator of all and singular the goods, chattels and credits, which were of R. H., deceased, at the time of his death, left unadministered by M. H., in her lifetime, now deceased, and which said M. H., in her lifetime, and at the time of her death, was administratrix of the goods, chattels, rights and credits, which were of the said R. H., deceased, at the time of his death), that J. M., deceased, when in sound mind, duly made his last will and testament in writing, and thereby, after bequeathing several pecuniary legacies, gave the residue of his personal estate and effects (subject to the payment of his debts) to his daughter H., then an infant under the age of twenty-one years, but now the wife of J. C. (and which said J. C. and H., his wife, are two of the defendants hereinafter named), and thereby appointed R. P. (another defendant hereinafter named) and the said R. H., executors of his said will, as by the probate copy of such will, reference being thereto had, will more fully appear. And your orator further showeth unto Your Honor that the said testator died on or about the ——— day of ———, 19—, without altering or revoking his said will, leaving his said daughter H. him surviving; and upon or soon after his decease, the said R. P. and R. H., as such executors, as aforesaid, duly proved the said will in the proper court, and the said R. P., who principally acted in the execution of said will (the said R. H. having only interfered for the sake of conformity), under and by such probate, possessed himself of a considerable part of the said testator's personal estate and effects. And your orator further showeth unto Your Honor that the said R. H. departed this life on or about the ——— day of ———, 19—; and shortly after his decease letters of administration were duly granted to the said M. H., his wife, who died on or about the ——— day of ———, 19—; and after her decease, such letters of administration of the unadministered

personal estate of the said R. H., deceased, as aforesaid, were duly granted to your orator by the ——— court of ———, and thereupon your orator gave bond and duly qualified as such administrator, as by such letters of administration and such bond, reference being thereto had, will fully appear.

And your orator further showeth unto Your Honor that the said R. H., previously to his death, accounted for and paid to the said R. P., as such coexecutor as aforesaid, all such part of the personal estate of the said testator as had been received by him, R. H., as such executor, as aforesaid, and no part of such personal estate remained in the hands of the said R. H. at the time of his decease, previously whereto the said R. H. resided in the country, where his house was robbed, and all papers (relative to his acts as such executor as aforesaid, and for which he had so accounted as hereinbefore mentioned), were stolen, and have never hitherto been recovered. And your orator further showeth unto Your Honor that the said J. C. and H., his wife, duly intermarried previously to the said H. attaining the age of twenty-one years, which she has since done, and after that period the said R. P. duly accounted for the residue of the said testator's personal estate with the said J. C. (who, in right of the said H., his wife, became entitled to receive the same), and thereupon obtained a general release from the said J. C. and H., his wife, of all demands in respect thereof, as by the said release, reference being thereto had, will appear. And your orator hoped, under the circumstances aforesaid, he would not have been called upon for an account of the administration of the said testator's personal estate.

But now, so it is, the said J. C. and H., his wife, combining and confederating with the said R. P., and divers other persons at present unknown to your orator, whose names, when discovered, your orator prays he may be at liberty to insert herein, with apt words to charge them as parties defendants hereto, and contriving how to wrong and injure your orator in the premises, have lately filed their bill in this honorable court against your orator, as such representative of the said

R. H., deceased, as aforesaid, for an account of the personal estate of the said testator, J. M., received by the said R. H., deceased, in his lifetime, as such executor as aforesaid, thereby praying that your orator may be decreed to pay the said J. C., in right of the said H., his wife, what upon such account shall appear to be due to the said J. C., in right of the said H., his wife, out of the assets of the said R. H.; and to which said bill they have made the said R. P. a defendant, without praying any account or relief against him. And they pretend that there are various receipts and accounts [*particularize those charged in the original bill*] of the said R. H., deceased, as such executor aforesaid, as to the personal estate of the said testator, which remained unaccounted for by the said R. H. at his decease, and which ought to be paid by your orator. Whereas your orator charges the contrary thereof to be true [*negative specifically the pretended receipts and accounts*], and that an account was stated, and a settlement of accounts took place between the said R. H. previously to his death, and the said R. P., and that an account has likewise been stated and settled by and between the said R. P., as such surviving executor as aforesaid, and the said J. C., in right of the said H., his wife, since she attained the age of twenty-one years, as aforesaid; and that no demand was ever made on the personal estate of the said R. H., in respect of his accounts, until lately, when the loss of such papers as aforesaid was discovered, and of which your orator charges an undue advantage is intended and attempted to be taken, and your orator also charges that the said R. P. abets the said J. C. and H., his wife, in their proceedings, and refuses to indemnify the personal estate of the said R. H., in respect to his accounts in the execution of the will of the said testator, J. M., so accounted for by him, and settled with the said R. P. as aforesaid; and the said R. P. also refuses to inform your orator what he knows of the matters aforesaid, or any of them, and also denies such statements as have been made by him relative thereto.

Your orator therefore prays that the said J. C. and H., his wife, and said R. P. and the rest of the confederates, when dis-

covered, may be made parties defendant to this bill; and may upon their several and respective corporal oaths, full, true, direct and perfect answer make to all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated, and they thereunto distinctly interrogated, and that not only as to the best of their respective knowledge and remembrance, but also to the best of their several and respective information and belief, and more especially that they may answer and set forth whether [*here follow the interrogatories to be answered*].

And the further prayer of your orator is that the said J. C. and H., his wife, may be decreed to execute to your orator, as such administrator of the goods, chattels and credits of the said R. H., deceased, left unadministered by the said M. H., also deceased, at the time of her death, a general release of all claims and demands upon such administered estate and effects of the said R. H., deceased, as aforesaid, in respect of all the accounts of the said R. H., in the execution of the will of the said testator, J. M.; or that an account may be taken of the said personal estate of the said testator, J. M., received by the said R. H., and of his application thereof; your orator being willing and hereby offering to pay what, if anything, shall appear to be due on the balance of such account; and that the said R. P. may be decreed to indemnify the estate of the said R. H. and your orator, as such administrator thereof, as aforesaid, in respect to such part thereof as the said R. P. paid to, or to the order, or for the use of the said R. P.; or otherwise to account for and pay the same to your orator. And that the said J. C. and H., his wife, may be decreed to pay to your orator his costs of this suit; and that your orator may have such further and other relief in the premises as the nature of his case may require, and to Your Honor may seem meet.

K. L.,
Solicitor for the Plaintiff.

J. H.,
By Counsel.[6]

[6] See Mitford & Tyler, Eq. Pl. and Pr., 563, in which this form appears; *ante*, §§ 208-225, but especially § 217.

No. 172*a*.

§ 1027. A cross-bill in the nature of a plea puis darrein continuance.

[*After the usual caption.*]

Your orator, A. B., respectfully represents unto Your Honor that on the ——— day of ———, 19—, C. D., the defendant hereinafter named, filed his bill of complaint in this honorable court against your orator, thereby praying [*here state the prayer of the bill*]; and your orator, being duly served with process, appeared and put in his answer thereto, to which answer the said C. D. filed a replication; and issue being thus joined, testimony was taken on both sides, and the proofs closed; whereupon the said cause was set down for hearing, as by the said bill, and other pleadings and proceedings in the said cause, now remaining as of record in this honorable court, reference being thereto had, will more fully appear.

Your orator further represents that the said cause has not yet been heard; and on the ——— day of ———, 19—, the said C. D., by a certain writing of release, of that date, did remise, release and forever quit-claim unto your orator, his heirs, executors and administrators, the several matters and things complained of in and by the said bill of the said C. D., and in question in the said suit, and each and every of them, and of all sums of money then due and owing, or thereafter to become due and owing, together with all and all manner of actions, causes of actions, suits and demands whatsoever, both at law and in equity, or otherwise howsoever, which he, the said C. D., then had, or which he should or might at any time or times thereafter have, claim, allege or demand, against your orator, for, or by reason or means of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of the said deed or writing of release; as by the said

For form of a cross-bill based on Lockwood v. Carter Oil Co., 73 W. Va. 175, 80 S. E. 814, 52 L. R. A. (N.S.) 765, see 3 Whitehouse, Eq. Prac., 2386.

release, reference thereunto being had, and a copy of the same hereto attached, marked "Exhibit A," and made a part of this bill, will more fully appear.

And your orator hoped that, in consequence of the said release, the said C. D. would not have proceeded in the said suit against your orator; but the said C. D., notwithstanding the said release, threatens and intends to proceed in the said suit, and to bring the same on for hearing in due course; and he pretends that no such release was ever executed by him, or if so, that the same was obtained by fraud and surprise, and therefore void. Whereas your orator charges that the same was, in every respect, fairly and properly obtained by your orator, and duly executed by the said C. D.

And your orator further represents that, under the circumstances aforesaid, he is unable to put the said release in issue, or to use the same as a plea in bar of said suit.

Your orator therefore prays that the said C. D. may be made a party defendant to this cross-bill; that the said release may be established and declared by this honorable court a sufficient bar to any further proceedings by the said C. D. in the said suit; that the bill of the said C. D. therein may, under the circumstances, be forthwith dismissed with costs; and that your orator may have such other and further relief in the premises as equity may require and to Your Honor shall seem meet.

F. G., A. B.,
Solicitor for the Plaintiff. By Counsel.[7]

No. 173.

§ 1028. Of review upon errors in law.

[*After the proper title.*]

Your orator, A——— B———, respectfully represents that on the ——— day of ———, 19—, one C——— D——— exhibited his bill of complaint in this honorable court against your orator in the words and figures following, to-wit: [*here*

[7] Taken from Puterbaugh, Ch. Pl. and Pr. (3d Ed.), 373.

insert copy of bill] and on the same day process was issued upon said bill in the words and figures following, to-wit: [*here insert copy of process*] which was served upon your orator on the ——— day of ———, 19—; that on the ——— day of ———, 19—, your orator appeared and put in his answer to said bill, in the words and figures following, to-wit: [*here insert copy of answer*] and the said C——— D——— on the ——— day of ———, 19—, filed his replication to said answer, as follows, to-wit: [*here insert*] and issue being joined, the following other proceedings were had in said cause, to-wit: [*here insert all the proceedings down to and including the final decree*].*

And your orator further represents that the said decree is erroneous and ought to be reviewed, reversed and set aside for many apparent errors and imperfections, among which are the following:

First. The court erred in the decree rendered in this cause in [*here insert the error complained of*].

Second. The court further erred in the rendition of its said decree in [*here insert the second error and continue until the assignment of errors is completed*].

For all of which errors and imperfections in said decree appearing upon the face thereof, your orator has brought this his bill of review, to have the said decree reviewed and set aside, and thereby to be relieved in the premises.

Your orator therefore prays that the said C——— D——— may be made a party defendant to this bill, and may be required to make full and direct answer to the same; that said decree may be reviewed, reversed and set aside, and any further proceedings ceased thereon; and that your orator may have such other and further relief in the premises as equity may require, and to Your Honor shall seem meet.

T——— J——— M———, A——— B———,
Solicitor for the Plaintiff. By Counsel.[8]

[8] Taken substantially from Puterbaugh, Ch. Pl. and Pr. (3d Ed.), 318.

For form of a bill of review for error apparent in a decree *pro confesso*, based on Dunbar v. Dunbar, 67 W. Va. 518, 68 S. E. 120, see 3 Whitehouse, Eq. Prac., 2405.

No. 174.

§ 1029. Of review on discovery of new matter.

[*As in No. 173 down to the* *.]

And your orator further represents, by leave of this honorable court, first had and obtained for that purpose, that since the rendition of the said decree your orator has discovered new matter of consequence and material in said cause, particularly that, etc. [*here set forth the new matter discovered*]; which new matter your orator did not know, and could not, by reasonable diligence, have known, so as to have made use thereof in the said cause, previous to and at the time of the hearing and the pronouncing of the said decree; and that your orator first learned of the existence of the said newly-discovered evidence about, etc. [*here give the date of the discovery as near as may be*]; and your orator is advised that said new matter, etc. [*here state the bearing of such new matter upon the decree*].

And your orator further represents that such new matter is not merely cumulative, confirmatory nor corroborative, nor does it go merely to the impeachment of character of a witness, or witnesses, already examined in said cause; but that such new matter is material and relevant in said cause and such as would probably have produced a different result had it been used at the hearing of said cause, and such as would call for a different decree from that which was rendered therein.

And your orator further represents that he is advised and insists that under the circumstances aforesaid, the said decree, in consequence of the discovery of such new matter as aforesaid, ought to be reviewed and reversed.

Your orator therefore prays that the said C——— D——— may be made a party defendant to this bill, and that he may be required to answer the same; that the decree and all proceedings thereon may be reviewed and reversed, and any further proceedings ceased thereon; and that your orator may

have such other, further and general relief as equity may require, and as to Your Honor may seem meet.

L——— C——— P———, A——— B———,
Solicitor for the Plaintiff. By Counsel.[9]

[*Add affidavit as in No. 269.*]

[9] Taken from Puterbaugh, Ch. Pl. and Pr. (3d Ed.), 319.

CHAPTER XI

PETITIONS

§ 1030. Observations.
§ 1031. By guardian for the sale of infant's lands.
§ 1032. By guardian for the lease of infant's lands.
§ 1033. By guardian to give mortgage or deed of trust on infant's land.
§ 1034. To transfer estate of minor or insane person into another state or county.
§ 1035. By guardian to be allowed to apply part of the principal to the education or maintenance of the ward.
§ 1036. By guardian for permission to submit matter to arbitration.
§ 1037. By husband for release of inchoate right of dower of insane wife.
§ 1038. By a guardian to remove proceeds of the sale of real estate of the infant out of the state.
§ 1039. By church trustees for the sale of church property.
§ 1040. Petition making new parties to suit.
§ 1041. Petition for rehearing.
§ 1042. Disputing the validity of attachment by third party.
§ 1043. For a rehearing by a nonresident after the entry of a decree upon an order of publication in an attachment suit.
§ 1044. Where the petitioner was proceeded against as an unknown party.
§ 1045. For leave to file a bill of review for errors apparent upon the face of the decree.
§ 1046. For leave to file a bill of review upon discovery of new matter.

§ 1030. Observations.

As there are not a few matters of practice that now originate in a court of equity by petition, as well as other matters brought to the attention of the court in the same manner as incident to a pending cause, it is thought advisable to devote a distinct and separate portion of this work to the subject of the forms of petitions as now employed by our courts of equity, and especially those of the *Virginias*.[1]

[1] See *ante*, §§ 244-271.

No. 175.

§ 1031. By guardian for the sale of infant's lands.

To the Honorable ———,

Judge of the Circuit Court of ——— County, in the State of ———:

The undersigned, your petitioner, respectfully represents unto Your Honor that he is the guardian of C——— D———, an infant under twenty-one years of age; that the said petitioner was duly appointed and qualified as the guardian of said C——— D——— in the ——— court of ——— county, and state of ———, on the ——— day of ———, 19—, as will more fully and at large appear by reference to your petitioner's said appointment and qualification, a copy of the order whereof is herewith filed, marked "Exhibit No. 1," and made part of this petition.°

Your petitioner further represents unto Your Honor that his said ward, C——— D———, is the owner in fee simple of a certain parcel of real estate, situate in [*here describe the property*], which is the only real estate or interest in any real estate owned by the said infant; that the only personal property or estate owned by the said infant consists of [*here describe the same*]; that the said C——— D——— is over the age of fourteen years;† that no one else except the said infant is in any manner interested in the said real estate * or the sale thereof.

Your petitioner further sheweth unto the court that in the opinion of your petitioner a sale of the aforesaid tract of land would promote the interests of the said infant, because, as your petitioner here avers [*here state the facts or grounds relied on to show that the interests of the infant would be promoted by a sale*].

Your petitioner further sheweth unto Your Honor that he has given the said C——— D——— ten days' notice of your petitioner's intention to apply to this court for the relief sought by this petition.

Your petitioner further sheweth unto Your Honor that the rights of no person will be violated by a sale of said real estate.

Your petitioner therefore prays that the said infant, C——— D———, may be made a party defendant to this petition; that a suitable person be appointed guardian *ad litem* for the said infant; and that he may be required to be present at the hearing of said petition; that the said tract of land be sold and the proceeds thereof be invested for the benefit of the said infant as the court may direct, and that all proper orders and decrees may be made and accounts and inquiries directed; and grant unto your petitioner such other, further and general relief as the nature of the case may require or may seem proper in the premises.

A——— B———,
By Counsel.[2]

Q——— G——— S———,
Solicitor for the Petitioner.

[*Verify by affidavit as in No. 260.*]

No. 176.

§ 1032. By guardian for the lease of infant's lands.

[*As in No. 175 down to the *, then proceed as follows:*]

Your petitioner further sheweth unto Your Honor that the said land and personal property above described is all the property belonging to the said C——— D——— or in which the said C——— D——— is interested; that inasmuch as the said C——— D——— is now over fourteen years of age and his fortune justifies his liberal education, and he desires to be liberally educated, in the opinion of your petitioner it will greatly promote his interests if the income of his property be expended in his education at some school in this state.

Your petitioner further sheweth unto Your Honor that the said land is very valuable and will lease for at least the sum of ——— dollars per year.

Your petitioner further sheweth unto Your Honor that the letting of the said land for a definite period not exceeding

[2] Constructed from the provisions of the West Virginia statute, Code, 1913, c. 83, § 12.

——— years, at that rent, would promote the interests of the said C——— D———, and that in such letting the interests of no other person would be affected or damaged thereby.

Your petitioner further sheweth that he has given said C——— D——— ten days' notice of your petitioner's intention to apply to this court for the relief sought by this petition.

Your petitioner further sheweth unto Your Honor that the rights of no person will be violated by the lease or rental of the said real estate.

Your petitioner therefore prays that the said infant, C——— D———, may be made a party defendant to this petition; that a suitable person be appointed guardian *ad litem* for the said infant; and that he may be required to be present at the hearing of said petition; that the said tract of land be rented for the purposes hereinbefore designated; and grant unto your petitioner such other, further and general relief as the nature of his case may require or may seem proper in the premises.

J——— W——— L———, A——— B———,
Solicitor for the Petitioner. By Counsel.[3]

[*The above petition must be sworn to.*]

No. 177.

§ 1033. By guardian to give mortgage or deed of trust on infant's land.

[*As in No. 175 down to the *, then proceed as follows:*]

Your petitioner further sheweth unto Your Honor that said land and personal property above described is all the property belonging to the said C——— D——— or in which the said C——— D——— is interested; that the said land is underlaid with valuable coal, but that the surface is wholly unfit for agricultural purposes; that the income of the estate of the said

[3] Based on West Virginia statute, Code, 1913, c. 83, § 12.

C——— D——— is insufficient to pay the taxes on the said real estate and to maintain and educate him; that the said land is wholly unproductive; that in the opinion of your petitioner it would be to the interest of said C——— D——— to negotiate a loan secured by a mortgage or deed of trust on said land, and open a coal bank on the said land and operate it, as the coal with which the said land is underlaid is of excellent value, and commands ready sale in the market; that your petitioner can have the bank opened up and the said mine put in running order for the mining and shipment of coal for the sum of ——— dollars; that the profits from the business will enable your petitioner to pay off and discharge the said trust or mortgage within a reasonable time.

Your petitioner further sheweth unto Your Honor that he has given said C——— D——— ten days' notice of your petitioner's intention to apply to this court for the relief sought by this petition.

Your petitioner further sheweth unto Your Honor that the rights of no person will be violated by so incumbering said real estate.

Your petitioner therefore prays that said infant, C——— D———, be made a party defendant to this petition; that a suitable person be appointed guardian *ad litem* for the said infant, and that such guardian *ad litem* may be required to be present at the hearing of said petition; that said tract of land may be mortgaged or a deed of trust placed thereon for the purposes hereinbefore designated; and grant unto your petitioner such other, further and general relief as the nature of the case may require, or as may seem proper in the premises.

J——— W——— L———, A——— B———,
Solicitor for the Petitioner. By Counsel.[4]

[*Above petition must be sworn to.*]

[4] Framed from the requirements of the West Virginia statute, Code, 1913, c. 83, § 12.

No. 178.

§ 1034. To transfer estate of minor or insane person into another state or county.

To the Honorable ———,
Judge of the Circuit Court of ——— County, State of ———:

The undersigned, your petitioner, N——— H———, respectfully represents that he is the guardian of R——— R———, a minor, and produces and files herewith, marked "Exhibit A," a transcript from the records of ——— court of the county of S———, in the state of M———, a court of competent jurisdiction in the premises, duly certified in accordance with the requirements of the act of Congress, showing that your orator has been duly appointed by said court of the state of M———, the guardian of said R——— R———, and that he has duly qualified as such guardian according to the laws of the said state of M———, and has given bond with sufficient security for the performance of his trust.*

Your petitioner further sheweth unto Your Honor that he, your petitioner, as well as his said ward, both reside in the town of C——— in the said county of S——— and state of M———, and that petitioner's said ward is entitled to the following described property in the county of J——— and state of West Virginia, to-wit [*here describe the same*]; which said property may be removed to another state without conflicting with any restriction or limitation thereon, and without impairing the right of his said ward thereto, or the rights of any other person.

Your petitioner further sheweth unto Your Honor that on the ——— day of ———, 19—, J——— F———, of the town of B———, in the said county of J——— and said state of West Virginia, was, by an order of the ——— court of ——— county, West Virginia, duly appointed guardian of the estate of the said R——— R———, in the said county of J———, and duly qualified as such.

Your petitioner therefore prays that an order may be made authorizing him, your petitioner, as such guardian, to remove the said property of said ward to the state of M———; that the said J——— F———, as guardian aforesaid, may be made a party defendant to this petition, as well also as the said R——— R———; that a suitable person be appointed guardian *ad litem* to the said infant defendant; that an order may be entered directing and requiring said J——— F———, guardian as aforesaid, to pay and deliver to the petitioner all personal property and money in his hands or in his control belonging to the said ward; that the said petitioner may be authorized to sue for, recover and receive all money or personal property which may belong to his said ward, including the accruing rents of his real estate, in like manner as if he were appointed a guardian of such ward in this state, and likewise to remove the same to the said state of M———, in which your petitioner was appointed and qualified as guardian aforesaid; and grant unto your petitioner such other, further and general relief as to equity may seem meet, or as the nature of the case may require.

N——— H———,
Guardian of R——— R———,
By Counsel.[5]

C——— F——— L———,
Solicitor for the Petitioner.

No. 179.

§ 1035. By guardian to be allowed to apply part of the principal to the education or maintenance of the ward.

[*As in No. 175 down to the* †:] that the income of the estate of said ward is insufficient for his maintenance and

[5] The foregoing form is adapted to c. 84, § 3, of the Code of West Virginia, and to a like statute in Virginia. Va. Code, 1913, § 2629.

It is not necessary to verify the petition by affidavit. Central Trust Co. of Illinois v. Hearne, 78 W. Va. 6, 88 S. E. 450.

The sufficiency of the petition is determined by its substance and not by its form. Fidelity Trust Co. v. Davis Trust Co., 74 W. Va. 763, 83 S. E. 59.

education; that the said ward is of delicate constitution, and is not able to support himself by manual labor, but the said ward has great intellectual aptitudes and a fondness for intellectual pursuits, which he can pursue very readily; that it would be best to appropriate the ——— part of the principal of the said estate of said ward for his maintenance and education, and in the opinion of your petitioner, the said portion of the principal would be sufficient to make up the deficit in the income of said ward.

Wherefore your petitioner prays that some suitable person be appointed to act as guardian *ad litem* for his said ward who shall answer this petition and attend to his interests in this proceeding; that a day may be set for hearing this petition and the proofs to be submitted therein; that an order be made granting your petitioner leave to appropriate such part of the principal of the estate of said ward, as hereinbefore set out, as may be necessary and sufficient for the purposes hereinbefore set forth.

A——— B———,
By Counsel.[6]

H——— L——— K———,
Solicitor for Petitioner.

No. 180.

§ 1036. By guardian for permission to submit matter to arbitration.

[*As in No. 175 down to the* °, *then proceed as follows:*]

Your petitioner further sheweth unto Your Honor that there came into his hands as such guardian, by the last will and

[6] See W. Va. Code, 1913, c. 82, § 8. See Va. Code, 1904, § 2604.

The statute does not require such petition to be verified by oath, nor would there seem to be any general policy requiring such verification any more than in the case of the previous form. See *ante*, § 1034, note 5.

The right to apply to a court of equity for leave to expend a part of an infant's estate for its maintenance and education does not belong exclusively to the guardian, but a father may resort to equity to have allowance made for an infant daughter's support and education decreed to be paid out of the income of the estate of the daugh-

testament of E——— D———, father of the said C——— D———, two horses; that the said two horses are claimed by one F——— G———, who threatens to bring suit against your petitioner for the specific recovery of said horses.

Your petitioner now asks for permission to submit to arbitration the question as to the ownership of said horses, and assigns the following as the reasons why he asks permission to submit the said question to arbitration:

1st. The horses are not worth to exceed the sum of one hundred and fifty dollars.

2nd. Your petitioner lives about twenty miles from the county seat, and the evidence of several witnesses is necessary in the matter of deciding the ownership of said horses.

3rd. The arbitration of the question of ownership would save the expenses of an attorney's fee, as your petitioner would attend to the matter of arbitration in person.

4th. Suitable men to act as arbitrators can be selected in the vicinity in which your petitioner and the said F——— G——— reside.

5th. It will be much less expensive to settle said question by arbitration, and the matter can be determined in a much shorter time; and it is to the interest of petitioner's said ward to settle said matter as soon as can practically be done, as your petitioner has an opportunity to sell the said horses at full value, but a delay incident to a suit would deprive him of the sale of said horses, and they are expensive to keep and of no service to the ward.

Your petitioner therefore prays that an order may be made permitting this petitioner to arbitrate the matters hereinabove set out; that the award may be entered as the judgment of the court in reference to the said matter; that said F——— G——— may be made a party defendant to this petition, and a suitable person appointed to act as his guardian *ad litem;*

ter by the trustee of the estate, where, by reason of his poverty and bodily infirmity, he has become unable to support her. Watts v. Steele, 19 Alabama 656, 54 Am. Dec. 207.

and grant unto your petitioner such other and further relief as the court may see fit to grant.

A——— B———,
E——— J———, Guardian of C——— D———,
Solicitor for the Petitioner. By Counsel.[7]

No. 181.

§ 1037. By husband for release of inchoate right of dower of insane wife.

To the Honorable ———,
Judge of the Circuit Court of ——— County, in the State of ———:

The undersigned, your petitioner, J——— D———, of the county and state aforesaid, respectfully sheweth unto Your Honor that he is the owner of the following described lands and premises, to-wit: [*here describe the land sufficiently for identification*]; and that he can sell the same for ——— dollars, and that his interests require, and would be promoted by, the sale of the same at the said figure.

Your petitioner further sheweth that his wife, C——— D———, is entitled to an inchoate right of dower in said premises, and that she is insane and has been, by due process of law, adjudged a lunatic, and is now confined at the state asylum for the insane at ———, in the county of ——— and state of ———, and by her mental infirmity is incapacitated from executing a valid release and relinquishment of her said right of dower.

Your petitioner therefore prays that his said wife, C——— D———, may be made a party defendant to this petition; that a suitable and proper person be appointed guardian *ad litem* for her; that Your Honor will inquire into the merits of this application, and will direct such release and relinquishment

[7] The above form is founded upon the statute of West Virginia, Code, 1913, c. 108, §§ 1-5, and a similar statute in Virginia, Code, 1904, §§ 3006-3010.

to be made by a commissioner in chancery of this court, by and according to the statute in such case made and provided; and will grant to your petitioner such other and further relief in the premises as shall be agreeable to equity, and the nature of his case may require.

J——— D———, Petitioner,

F——— C———, By Counsel.[8]

Solicitor for the Petitioner.

No. 182.

§ 1038. By a guardian to remove proceeds of the sale of real estate of the infant out of the state.

[*As in No. 178 to the *, then proceed as follows:*]

Your petitioner further sheweth unto Your Honor that both he and the said ward are residents of the town of C———, in the said county of S——— and state of M———, and that petitioner's said ward was at one time the owner of a certain tract of land, which was sold, and the proceeds thereof invested in securities now held by and payable to E——— F———, the guardian of said C——— D——— hereinafter mentioned, resident in this state, which securities consist in [*here set out the securities*]; which said property or securities, the proceeds of the sale of said real estate, may be removed to another state without conflicting with any restriction or limitation thereon, and such removal will not impair the rights nor be prejudicial to the interests of your petitioner's said ward, nor those of any other person interested or to become interested therein.

Your petitioner further represents unto Your Honor that notice of the application for the removal by your petitioner of the proceeds of the sale of said real estate has been given to the persons interested therein, by personal service on said parties, and that said notice has also been published once a

[8] See *ante*, § 862.

week for four successive weeks in the ———, a newspaper published in the said county of ——— and state of ———, as will more fully and at large appear by copies of said notices, and the service and the affidavit of the publication, herewith filed as part of this petition.

Your petitioner further sheweth unto Your Honor that on the ——— day of ———, 19—, E——— F———, of the town of B———, in the said county of J———, and state of West Virginia, was, by an order of the ——— court of said county, duly appointed guardian of the estate of the said C——— D——— in the said county of J———, and duly qualified as such, and is now and ever since has been acting as such guardian.

Your petitioner further sheweth unto Your Honor that no one is interested in the proceeds of the sale of said real estate except said C——— D———, and his said guardian, E——— F———, resident in this state.

Your petitioner further sheweth unto Your Honor that J——— D——— is a brother of the said C——— D———, and would be the heir-at-law of the said C——— D——— if the said C——— D——— were dead, and the said J——— D——— resides in this state and gives his consent to the removal of the proceeds of said real estate into said state of M———, as will more fully and at large appear by reference to his consent thereto given, in writing, which writing is herewith filed and made a part of this petition.

Your petitioner further sheweth that the proceeds of the sale of said real estate was invested in said securities above designated under and by virtue of an order of this court, entered of record on the ——— day of ———, 19—, in a certain suit wherein ——— was plaintiff and ——— was defendant, as by the records of this court now on file, reference being had thereto, will more fully appear.

Your petitioner therefore prays that the said securities, proceeds of the sale of the said real estate, be paid and delivered to your petitioner, and that he be permitted to remove the same into the said state of M———, the state of the residence of

your petitioner and his said ward; that the said E——— F———, resident guardian of the said C——— D———, as aforesaid, and the said J——— D———, be made parties to this petition; that the said C——— D——— may be made a defendant hereto, and a suitable person appointed as guardian *ad litem* for the said C——— D———; and grant unto the petitioner such other, further and general relief as to equity may seem meet.

A——— B———,
Guardian of C——— D———,
By Counsel.[9]

G——— S——— C———,
Solicitor for the Petitioner.

No. 183.

§ 1039. By church trustees for the sale of church property.

To the Honorable ———,
Judge of the Circuit Court of ——— County, State of West Virginia:

The undersigned, your petitioners, respectfully represent unto Your Honor that they constitute the trustees of the Presbyterian Church in P———, located in the Kanawha Presbytery of the Presbyterian Church in the United States; that they, as trustees, are holding by deed a certain piece or parcel of ground conveyed to them as such trustees for the benefit of the said church on the ——— day of ———, 19—, which deed is duly of record in the office of the clerk of the county court of said county, in Deed Book No. ———, at page ———, an attested copy whereof is herewith filed, marked "Exhibit A," and made part of this petition.

Your petitioners further represent unto Your Honor that the membership of the Presbyterian Church in the town of P——— consists of about ——— members; that this petition is filed by the said board of trustees of the said church, both on behalf of themselves and all the members of the said congregation of said church in the said town of P———.

[9] See W. Va. Code, 1913, c. 84, §§ 4, 5, 7.

Your petitioners further shew and represent unto Your Honor that they, as said board of trustees, deem that the interests of those for whose benefit and use the said property is held in trust, to-wit, the Presbyterian Church in the town of P———, will be promoted by a sale of said property, and that the rights of no person will be violated thereby; and your petitioners further represent unto Your Honor that a majority of the members of said church desire the sale of said property, as will more fully and at large appear by the minutes of a meeting of the members of said church, held on the ——— day of ———, 19—, a copy of which is herewith filed, marked "Exhibit B," and made part of this petition.

Your petitioners further represent unto Your Honor that the authority to administer the affairs of the said Presbyterian Church in the said town of P——— is committed to and resides in the Kanawha Presbytery, composed of the counties of ———, in said state; that said presbytery has given its consent to said sale, and also expressed its desire therefor, as will more fully appear from the minutes of said presbytery relating to said matter, a copy of which is herewith filed, marked "Exhibit C," and made part of this petition.

Your petitioners therefore pray that they may be permitted to make sale of said property; that an order of publication may be directed by Your Honor, stating the filing of this petition and the object thereof, and also directing that said order of publication be posted on the court-house door of said county, and at some conspicuous place on the premises of said church property, and published for such time and in such manner as Your Honor may prescribe; and grant unto your petitioners such other, further and general relief as the nature of the case may require.

A——— B———,
C——— D———,
and E——— F———,
Trustees, Presbyterian Church,
By Counsel.[10]

H——— I——— J———,
Solicitor for the Petitioners.

[10] The foregoing form is based upon the statute of West Virginia, Code, 1913, c. 57, § 9.

No. 184.

§ 1040. Petition making new parties to suit.

To the Honorable ———,
Judge of the Circuit Court of ——— County, in the State of West Virginia:

The undersigned, your petitioner, respectfully represents unto Your Honor that O——— S———, on behalf of himself and the citizens and taxpayers of R——— school district, in the county and state aforesaid, brought a suit in Your Honor's court to restrain and enjoin the payment of three certain orders issued by the Board of Education of said district, numbered 44, 45 and 46, respectively, as will more fully and at large appear from the bill filed in said cause, reference being had thereto, now on file in Your Honor's court.

Your petitioner further sheweth unto Your Honor that the Board of Education of said district, The Educational Aid Association, a corporation, J——— M——— P———, sheriff of said county, and F——— M——— D———, are made defendants to the said suit, as will more fully appear by reference to the papers therein, the record of which suit is hereby referred to and made part of this petition.

Your petitioner further represents unto Your Honor that the gravamen of said suit is as to the validity of said orders.

Your petitioner further sheweth unto Your Honor that the said Educational Aid Association placed the said orders in the bill and proceedings in said suit mentioned and described, amounting to ——— dollars, the payment of which has been enjoined, in the hands of said F——— M——— D——— to be sold.

Your petitioner further represents unto Your Honor that he has bought said orders and paid the cash therefor, and is the owner and holder of the same and each one thereof; and that the defendant, The Educational Aid Association, no longer has any interest whatever in said orders, nor has the said F——— M——— D———.

Your petitioner therefore prays that he may be made a party defendant to said suit; that the plaintiff be required to amend his bill so as to show the petitioner's interest in the matter of controversy in said suit, and so as properly to make this petitioner a defendant thereto; that the said plaintiff in said suit, as well as the said defendants thereto above named, may be made parties to this petition; that process may be issued thereon, to be served upon the parties so asked to be made defendants to this petition; and grant unto your petitioner such other and further relief as the nature of your petitioner's case may require, and as in duty bound he will ever pray, etc.

F——— E——— D———,

E——— L——— S———, By Counsel.[11]

Solicitor for the Petitioner.

[*When the bill is sworn to the petition should be sworn to also.*]

No. 185.

§ 1041. Petition for rehearing.

A——— B———
v. } In Chancery.
C——— D———

Pending in the Circuit Court of ——— County, in the State of ———.

To the Honorable ———, Judge of said Court.*

The undersigned, your petitioner, respectfully represents unto Your Honor that he is aggrieved by a decretal order made by Your Honor in the above entitled cause on the ——— day of ———, 19—, whereby it was, among other things, ordered and decreed that [*here insert the part of the decree complained of*]; and your petitioner submits that so much of the said decree as directs that [*here set out that part of the decree claimed*

[11] This form is based upon the case of Shinn v. Board of Education, 39 W. Va. 497, 20 S. E. 604; Sands, Suit in Equity, 685 *et seq.*; Dunfee v. Childs, 45 W. Va. 155, 30 S. E. 102; *ante*, § 245.

to be erroneous] is erroneous because your petitioner sheweth unto Your Honor that [*here set out the facts and grounds showing wherein the decree is erroneous*].

Your petitioner further sheweth unto Your Honor that it will readily appear that the said decree is erroneous in the matters hereinabove complained of, when the bill in said cause and its exhibits filed therewith, your petitioner's answer thereto, and all the proceedings had in said cause, are examined and considered, which are referred to, exhibited with, and made parts of this petition.

Your petitioner here further sheweth unto Your Honor that the decree above complained of is not final, but interlocutory, as from an inspection of the record in said case herewith exhibited will be made apparent.

Your petitioner therefore prays that Your Honor will be pleased to vouchsafe a rehearing of this cause by Your Honor; that the said decree may be corrected as to the matters of error hereinabove set forth, and to that extent the said decree may be set aside and annulled; and grant unto your petitioner such other and further relief as the nature of his complaint may require, and as in duty bound he will ever pray, etc.

F——— G———, C——— D———,
Solicitor for the Petitioner. By Counsel.[12]

No. 186.

§ 1042. Disputing the validity of attachment by third party.

A——— B———
v. } In Chancery.
C——— D———

Pending in the Circuit Court of ——— County, in the State of ———.

To the Honorable ———, Judge of the said Court:

The undersigned, your petitioner, respectfully sheweth unto Your Honor that he is informed and believes, and so states,

[12] The above form of petition is substantially taken from 3 Barb., Ch. Pr., p. 457, No. 170.

that an order of attachment was issued in the above entitled cause against the property of the defendant, C——— D———, and was on the ——— day of ———, 19—, levied on the property mentioned and described in the officer's return made upon said order of attachment, to the record in which case, with all the papers, exhibits and files thereunto belonging, reference is hereby made for the purposes of this petition, and asked to be taken and read as part hereof.

Your orator further sheweth unto Your Honor that on the ——— day of ———, 19—, and subsequently to the institution of the above entitled cause, your petitioner brought a suit in chancery also against the said C——— D——— in Your Honor's court, in which an attachment was issued and levied upon the same property upon which the attachment issued in the above entitled cause was levied, as will more fully appear by the record in your petitioner's case, together with the exhibits, papers and files therein, hereby referred to and made part of this petition.

Your petitioner further sheweth unto Your Honor that he is advised, and so charges, that the attachment levied in the above cause in favor of the said A——— B——— is not a valid attachment, because the affidavit upon which it is based is defective, in this [*here set out the defect in the affidavit, or any other ground that exists for invalidating the attachment may be set out*].

Your petitioner further avers that by virtue of the attachment levied in the suit in which your petitioner is plaintiff, against the said C——— D———, petitioner has a valid and subsisting lien upon the property attached in the above entitled cause, wherein the said A——— B——— is plaintiff and the said C——— D——— defendant.

Your petitioner further sheweth unto Your Honor that he is ready and willing to give the security for costs as required by the laws of this state in a procedure of this character, in such sum and in such conditions as the court may prescribe.

Your petitioner therefore prays that a jury may be impaneled to inquire into the claim of your petitioner, as herein-

before set forth, unless the same be waived, and that the court may make such other orders as may be necessary to protect the rights of your petitioner; and grant unto petitioner such other, further relief as the nature of his case may require.

L——— U———, E——— F———,
Solicitor for the Petitioner. By Counsel.[13]

No. 187.

§ 1043. For a rehearing by a nonresident after the entry of a decree upon an order of publication in an attachment suit.

[*As in No. 185 to the* *.]

The undersigned, your petitioner, respectfully represents unto Your Honor that a decree was entered in the above-entitled cause on the ——— day of ———, 19—, against your petitioner, and by which he is aggrieved, upon an order of publication; that an order of attachment was issued in said cause and levied upon the property of your petitioner; that your petitioner was not served with a copy of the attachment nor any process issued in said suit sixty days prior to the rendition of said decree against him; that your petitioner did not appear and make defense in or to the said suit; that your petitioner has a just and valid defense thereto [*which may be set out, though this is not necessary*].

Your petitioner here refers to the bill, its exhibits, all the process, papers, and the entire record of said cause, for the purposes of this petition, and asks that they be taken and read as parts hereof.

Your petitioner therefore prays that said decree may be reopened and reheard, and that your petitioner, upon giving bond for costs as required by statute, which he is willing and now offers to do, may be allowed to make such defense to the

[13] The above form is based upon the case of Miller v. White, 46 W. Va. 67, 33 S. E. 332, and is taken substantially from the record in that case.

said cause as he may be advised is lawful and proper; and grant unto your petitioner such further and general relief as equity and the law in such case made and provided may require.

C——— D———,
Petitioner,
By Counsel.[14]

J——— H———,
Solicitor fo e Petitioner.

No. 188.

§ 1044. Where the petitioner was proceeded against as an unknown party.

[*As in No. 187 to the* *.]

The undersigned, your petitioner, respectfully represents unto Your Honor that a decree was rendered in the above-entitled cause on the ——— day of ———, 19—, against your petitioner and others, and by which your petitioner is aggrieved, upon an order of publication; and in which your petitioner was proceeded against as an unknown party and was not served with process therein; that your petitioner has not been served with a copy of said decree at any time; that your petitioner was proceeded against as an unknown party and did not appear and make any defense in or to the above-entitled suit; that your petitioner has a just and valid defense thereto, because, as your petitioner avers [*here the grounds of defense may be set out, though it is not necessary to show the existence of any defense in order to have a rehearing under the statute*].

Your petitioner here refers to the bill filed in said cause, its exhibits, all the process, papers and the entire record therein, for the purposes of this petition, and asks that they may be taken and read as parts hereof.

Your petitioner therefore prays that said decree may be reopened and reheard, and that your petitioner, upon giving

[14] This form is based upon § 261 of this work, and particularly the case of Smith v. Life Association, 76 Va. 380.

bond for costs as required by statute, which he is willing and now offers to do, may be allowed to make such defense to said cause as he may be advised is lawful and proper; and grant unto your petitioner such further and general relief as equity and the law in such case made and provided may require.

C——— D———,
Petitioner,
By Counsel.[15]

J——— H———,
Solicitor for the Petitioner.

No. 189.

§ 1045. For leave to file a bill of review for errors apparent upon the face of the decree.

[*As in No. 185 to the *, then proceed as follows:*]

The petition of A——— B———, the above-named complainant, respectfully represents that on the ——— day of ———, 19—, the petitioner filed his bill in this honorable court against C——— D———, for the purpose of [*here state the object of the bill*]; and praying [*here state the prayer of the bill*].

And your petitioner further represents that the said C——— D———, being served with process, appeared and put in his answer thereto; to which a replication was filed, and the said case being at issue, witnesses were thereupon examined and the proofs closed; and that said case was brought to a hearing before Your Honor on the ——— day of ———, 19—; whereupon a decree was rendered to the following effect: [*here set forth the substance of the decree*].*

And your petitioner further represents that he is advised that the said decree is erroneous, and ought to be reviewed,

[15] The above form is constructed from the requirements of the W. Va. Code, 1913, c. 124, § 14, and a like statute in Virginia, Va. Code, 1904, § 3233, and differs very little from form No. 187, the principles governing the two being practically the same.

reversed and set aside for many apparent errors and imperfections, among which are the following:

First. The court erred in [*here set forth the error complained of*].

Second. The court erred in [*here set forth the further error and continue until all the errors are assigned*].

For all which errors and imperfections in said decree appearing on the face thereof, your petitioner is desirous of bringing his bill of review to be relieved in the premises.

Your petitioner therefore prays that leave may be granted to him to file a bill of review against the said C——— D——— for the purpose of having the said decree reviewed, reversed and set aside; and that no further proceedings may be had under the same.

A——— B———,
By Counsel.[16]

J——— H———,
Solicitor for the Petitioner.

[16] As we have already seen, *ante*, § 232, it is not now the practice in the Virginias to apply for leave to file a bill of review for error of law apparent upon the face of the decree; but, when application for leave is made, it is usual to do so by petition or motion. *Ante*, § 233.

In Martin v. Smith, 25 W. Va. 579, as appears by the printed record in that case, the application was by petition, which, after the style of the suit and usual address, was in the following form:

"We respectfully ask you to examine the accompanying bill, which contains the bill, Enos Smith's answer, and the decree awarded, and being advised by counsel that the cause ought to be reviewed, we humbly ask your honor's leave to file said bill."

The petition was signed by the plaintiffs in the bill of review and by their counsel.

Upon the petition was the following endorsement:

"Leave is hereby given to file the within bill of review upon the usual terms and conditions.

J. Smith,
Judge of the Circuit Court
of Mason County."

With the following direction to the clerk:

"To the Clerk of the Circuit Court of Mason County, West Virginia:"

The application to file this bill of review in Martin v. Smith, *supra*, was evidently made in the vacation of the court, as the bill was left with the clerk, a precipe then lodged with him, and the process upon the bill of review duly issued.

It seems to us that in the matter of a bill of review for error ap-

No. 190.

§ 1046. For leave to file a bill of review upon discovery of new matter.

[*As in Nos. 185 and 189, respectively, to the *, then proceed as follows:*]

And your petitioner further represents that since the rendition of said decree your petitioner has discovered new matter of consequence in the said suit, particularly that [*here set forth the new evidence distinctly and specifically*]; which new matter your petitioner did not know, and could not, by reasonable diligence, have known, so as to have made use thereof in the said cause, previous to and at the time of pronouncing the said decree; because, as your petitioner avers [*here state why it could not have been known by reasonable diligence*].

Your petitioner further sheweth unto your honor that he first learned of the newly-discovered evidence about [*here state when it was first discovered*].

And your petitioner further sheweth unto Your Honor that he is advised that the said new matter [*here state its bearing on the decree*].

And your petitioner further sheweth unto Your Honor that he is advised that the new matter above specified is relevant and material evidence to the matter involved in said suit, and such as would probably have produced a different result had it been used at the hearing of said cause, and such as would call for a different decree from that which was rendered.

And your petitioner further represents unto Your Honor that the said evidence is not merely confirmatory or cumulative, nor does it go to impeach the character of any witness or witnesses already examined in the cause.

Your petitioner therefore prays that he may be at liberty to file a bill of review for the purpose of having the said decree

parent upon the face of the decree the plaintiff should proceed as in any other chancery cause, as matter of course.

reviewed, reversed and set aside, and that no further proceedings be had under the same.

A——— B———,
By Counsel.[17]

H——— A——— S———,
Solicitor for the Petitioner.

[*The foregoing must be verified by affidavit as in No. 269a.*]

[17] This form is based on one found in Puterbaugh, Ch. Pl. and Pr. (3d Ed.), 316, and *ante*, §§ 230-236.

CHAPTER XLI

DEMURRERS

§ 1047. Title.
§ 1048. Joint and several demurrer.
§ 1049. Introduction to a demurrer to the whole of a bill.
§ 1050. Where the demurrer is to part of the bill, or to the relief.
§ 1051. General words of conclusion to a demurrer to the whole of the bill.
§ 1052. The usual form of demurrer in the Virginias.
§ 1053. Another common form of demurrer in the Virginias.
§ 1054. Demurrer for want of parties.
§ 1055. Demurrer for multifariousness.
§ 1056. Demurrer to a bill filed by an infant without a next friend.

TITLE AND COMMENCEMENT

No. 191.

§ 1047. Title.

[*Of a single defendant.*]

State of ———,
County of ———, to-wit:

In the Circuit Court thereof.

A——— B———, Plaintiff,
v.
C——— D———, Defendant. } In Chancery.[1]

*The demurrer of C. D., defendant, to the bill of complaint of A. B., the above-named plaintiff.

Or

The demurrer of John Jones (in the bill by mistake called William Jones), the above-named defendant [*or one of the above-named defendants*] to the, etc.

[1] In giving the title, where there are several defendants, name them, or say "C. D. and others."

No. 192.

§ 1048. Joint and several demurrer.

[*After the style of the cause as in No. 191 to the* * *and naming the other defendants.*]

The joint and several demurrer of C. D. and E. F., the [*or two of the*] above-named defendants, to the, etc.

Or

The joint demurrer of C. D. and E. F., his wife, the [*or two of the*] above-named defendants, to the, etc.[2]

No. 192*a*.

§ 1049. Introduction to a demurrer to the whole of a bill.

[*Style of the cause as in No. 191.*]

This defendant [*or* these defendants, *respectively*,], by protestation, not confessing or acknowledging all, or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, * *doth* [*or do as the case may be*] demur thereto, and for cause of demurrer, *showeth* [*or show*], that, etc.

No. 192*b*.

§ 1050. Where the demurrer is to part of the bill, or to the relief.

[*As in No. 192a to the* *] as to so much and such part of the bill as seeks that this defendant [*or* these defendants] may answer and set forth whether, etc.; and whether, etc.; and

[2] The above forms of title are taken from Lube, Eq. Pl., 471.

"A joint demurrer to a bill in equity by two defendants operates jointly and severally, and may be sustained as to one of them and overruled as to the other.

"A general demurrer to a bill in equity setting up several grounds for relief challenges the sufficiency of the bill as a whole and does not call for adjudication as to the sufficiency of each of the several parts." City of Wheeling v. Chesapeake & Potomac Telephone Co., 82 W. Va. 208, 95 S. E. 653.

prays, etc. [*if relief be prayed*]; *doth* [*or do*] demur, and for cause of demurrer *showeth* [*or show*].[3]

CONCLUSION

No. 192c.

§ 1051. General words of conclusion to a demurrer to the whole of the bill.

Wherefore this defendant [*or* these defendants, *respectively*,] demands * [*or* demand] the judgment of this honorable court, whether *he* shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and *prays* [*or pray*] to be hence dismissed, with *his* [*her or their*] reasonable costs in this behalf sustained.

A. B.,
By Counsel.

Or

Wherefore, and for divers other errors and imperfections, this defendant humbly demands, etc. [*as in form No. 192c from the* *].

No. 193.

§ 1052. The usual form of demurrer in the Virginias.

State of ———,
County of ———.
In the Circuit Court thereof.

A——— B———
v. } In Chancery.
C——— D———

*The defendant says that the bill filed in this cause is not sufficient in law. J——— M——— D———,
Solicitor.

[3] We have given the formal demurrer recognized in all chancery jurisdictions, but which has been superseded by the simpler statutory form in the Virginias.

No. 194.

§ 1053. Another common form of demurrer in the Virginias.

[*Follow form No. 193 to the *, then proceed as follows:*]

The defendant demurs to the bill filed in this suit, and for cause of demurrer says * that said bill is not sufficient in law.

J——— M——— B———,
Solicitor for the Demurrant.

No. 195.

§ 1054. Demurrer for want of parties.

[*Here follow form No. 192 to the * and No. 194 to the * and then proceed as follows:*] that it appears by the said complainant's said bill that G. H., therein named, is a necessary party to the said bill, inasmuch as it is therein stated that C. D., the testator in the said bill named did in his lifetime, by certain conveyances made to the said G. H., in consideration of $———, convey to him, by way of mortgage, certain estates in the said bill particularly mentioned and described, for the purpose of paying the said testator's debts and legacies; but the said complainant has not made the said G. H. a party to the said bill. Wherefore, etc. [*as in No. 192e*].

No. 196.

§ 1055. Demurrer for multifariousness.

[*Follow forms Nos. 193, 194, respectively, to the * and then proceed as follows:*] that it appears by the said bill that the same is exhibited by the said complainant against this defendant, C. D., E. F. and G. H., as defendants, for several distinct matters and causes, in many whereof, as appears by the said bill, this defendant is in no way interested; and, by reason of such distinct matters, the said bill is drawn out to a considerable length, and this defendant is compelled to take a copy of the whole thereof; and by joining distinct matters together,

which do not depend on each other, the proceedings in the progress of the said suit will be intricate and prolix, and this defendant put to unnecessary charges and expenses in matters which in no way relate to, or concern him. [*Concluded as in No. 192c.*]

No. 197.

§ 1056. Demurrer to a bill filed by an infant without a next friend.

[*Follow forms Nos. 193, 194, respectively, to the * and then proceed as follows:*] that the said complainant, who appears by the said bill to be an infant under the age of twenty-one years, hath exhibited his said bill without any person being therein named as his next friend. [*Conclude as No. 192c.*]

CHAPTER XLII

PLEAS IN ABATEMENT

§ 1057 To the jurisdiction of the court.
§ 1058. To the jurisdiction of the court.—Another form.
§ 1059. Of want of proper parties.
§ 1060. On the ground of plaintiff's infancy.
§ 1061. On the ground of plaintiff's insanity.
§ 1062. Of the pendency of another suit.
§ 1063. Controverting the existence of the grounds upon which an order of attachment was issued.

No. 198.

§ 1057. To the jurisdiction of the court.

State of ———,
County of M———. } ss.

In the ——— Court of said County.

A——— B———
v. } In Chancery.
C——— D———.

*This defendant, in his own proper person, for plea to the said bill and the jurisdiction of the court herein, says, that before and at the commencement of the said suit of the said A——— B———, he, the said C——— D———, was, and from thence hitherto has been, and still is, residing in the county of N———, in the state of West Virginia, and not in the said county of M———; and that the cause of action herein sued on did not, nor did any part thereof, arise in the said county of M———; but that the said cause of action herein sued on did arise, and every part thereof arose, in the said county of N——— [*or* in any other county, *except the one where suit is brought, as the case may be*]. And this he is

ready to verify; wherefore he prays judgment if the court will take cognizance of the suit aforesaid.

C——— D———.

E——— F———,
Counsel.

[*Append affidavit as in No. 259.*]

No. 199.

§ 1058. To the jurisdiction of the court—Another form.

In the Circuit Court of the County of M———, State of ———, ——— Rules, 19—.

James R. Raynors, Defendant,
ads.
William W. Williams, Complainant. } In Chancery.

The plea of James R. Raynors, defendant, to the bill of complaint exhibited against him and C. C. in this court by William W. Williams.

This defendant, for plea to the said bill, saith that he is now, and was at the time of the institution of this suit, a resident of the county of N———, state of ———, and not a resident of the county of M———, state of ———; that his codefendant, C. C., is now and was at the time of the institution of this suit, also a resident of the county of N———, and not a resident of the county of M———, and that they are the sole defendants in the said suit, and that said suit is brought to subject to the alleged judgment of the said plaintiff certain land, every part whereof lies in the county of N———, and not any part thereof in the county of M———. And this he is ready to verify; wherefore, the defendant doth plead to the jurisdiction of the said court, and prays the judgment of the court whether the court will take cognizance of the said suit.

E. F., Counsel. James R. R.

[*The above plea must be duly sworn to.*][1]

[1] A plea to the jurisdiction is essentially the same in equity as at law, 4 Minor, Inst., Pt. II, p. 1115. The above form would likely be sufficient without any allegation as to the residence of the defendants, the

No. 200.

§ 1059. Of want of proper parties.

[*As in No. 198 to the * and then as follows:*]

This defendant for plea to the said bill, says that as to so much of the complainant's bill as seeks an account from this defendant, as executor and heir-at-law of E. F., deceased, in the said bill named, this defendant's late brother, for what remains due and owing upon the bond in the said bill mentioned, bearing date on the ——— day of ———, 19—, and payment by this defendant as such executor and heir-at-law of the said E. F., deceased, as aforesaid, of what may be found due on taking such account; this defendant doth plead thereto, and for plea says, that no part of the sum of ——— dollars, for securing the repayment whereof the said bond was executed, was paid to, or secured by the said E. F., but that the whole was paid to G. H., in the said bond and in the said bill also named, and received by him for his sole use, and that the said E. F. was only a surety for the said G. H., and that the complainant afterwards accepted a composition for what he alleged to be due on the said bond from the said G. H., without the privity of the said E. F. in his lifetime, or this defendant since the death of the said E. F., which took place on or about the ——— day of ———, 19—, as in the said bill mentioned, since which no demand has been made on this defendant for any money alleged to be due on the said bond; and that the said G. H. died several years ago seized of considerable real estate, and also possessed of a large personal estate; and that his heir-at-law, or the devisee of his real estate, and also the representative of his personal estate, ought to be, but are not, made parties to the said bill.

The defendant therefore doth plead the foregoing matters and things to the whole of the said bill, and demands the judgment of this honorable court whether he ought to be compelled

situs of the land solely controlling the jurisdiction; but it is deemed advisable to insert the allegation as to residence as a matter of precaution. See *ante*, § 11.

to make any answer to the said bill of complaint; and prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

C. D.,
By Counsel.

E. F.,
Solicitor for the Defendant.

[*Verify the above plea by affidavit.*][2]

No. 201.

§ 1060. On the ground of plaintiff's infancy.

[*As in No. 198 to the * and then as follows:*]

This defendant, for plea to said bill, says that the said complainant, at the time of filing his said bill, was, and now is, an infant under the age of twenty-one years, that is to say, of the age of ——— or thereabouts. [*Add prayer as in No. 202.*]

C. H.,
By Counsel.

H. G.,
Solicitor for the Defendant.

[*Verify the above plea by affidavit.*][3]

No. 202.

§ 1061. On the ground of plaintiff's insanity.

[*As in No. 198 to the * and then as follows:*]

This defendant for plea to said bill says that the complainant who, by himself alone, attempts to sustain an injunction in this suit, before and at the time of filing his said bill, was duly found and declared to be a lunatic, under and by virtue of a commission of lunacy, duly awarded and issued against him, as by the inquisition thereon (a true copy whereof is now in this defendant's possession, and ready to be produced to this honorable court) to which this defendant craves leave to refer,

[2] See Hogg, Pl. and Forms, 244; *ante*, § 304; Puterbaugh, Ch. Pl. and Pr. (3d Ed.), 145.

[3] See Mit. & Tyler, Eq. Pl. and Pr., 589; 3 Daniell, Ch. Pl. and Pr., 2097.

will more fully appear; and which said commission has not hitherto been superseded, and still remains in full force and effect; and the said A. B., therein named, and the said plaintiff is, as this defendant avers, one and the same person, and are not other and different persons.

*Wherefore, this defendant humbly prays judgment of this court whether he shall be compelled to make any further or other answer to the said bill of complaint, and prays to be dismissed with his reasonable costs and charges in this behalf sustained.

C. D.,
By Counsel.

H. I.,
Solicitor for Defendant.

[*Verify the above plea by affidavit.*][4]

No. 203.

§ 1062. Of the pendency of another suit.

[*As in No. 198 to the * and then as follows:*]

This defendant, for plea to said bill, says that on the ——— day of ———, 19—, the said present complainant exhibited his bill of complaint in this honorable court against this defendant and one E. F. for an account of the moneys raised by the sale of the goods and property in the complainant's present bill mentioned, and claiming such shares and proportions thereof, and such rights and interests therein, as he now claims by his present bill; and praying relief against this defendant in the same manner, and for the same matters, and to the same effect as the complainant now prays by his said present bill; and this defendant and said E. F. appeared and put in their answer to the said former bill, and the said complainant replied thereto; and the said former bill, and the several proceedings in the said former cause, now remain depending, and as of

[4] See Mit. & Tyler, Eq. Pl. and Pr., 589, 590; 3 Daniell, Ch. Pl. and Pr. (6th Am. Ed.), 2097; Lube, Eq. Pl., 481; *ante*, § 306.

record in this honorable court, the said cause being yet undetermined and undismissed.

[*Add prayer as in No. 202.*]

M. M., C. D.,
Solicitor for Defendant. By Counsel.

[*Verify the above plea by affidavit.*][5]

No. 204.

§ 1063. Controverting the existence of the grounds upon which an order of attachment was issued.

[*As in No. 198 to the * and then as follows:*]

And the said defendant for plea to the attachment issued in the above entitled cause says that the said plaintiff ought not to maintain his said attachment because, this defendant says, the grounds stated in plaintiff's affidavit for the attachment issued in this cause did not exist at the time of the making and filing said affidavit, to-wit: [*here set out verbatim the grounds in plaintiff's affidavit.*]

The defendant therefore denies that any ground or grounds existed for an attachment in the above cause as set forth and specified in the said affidavit filed herein, and upon which the attachment in this cause was issued.

The defendant therefore prays that the issue arising upon the plea of this defendant be tried by a jury, and if the verdict thereon shall be for this defendant, this defendant further prays that judgment be entered that the said attachment issued in the above cause be abated.

C. D.,
J. W. C., By Counsel.[6]
Solicitor for the Defendant.

[*Verify the above plea by affidavit.*]

[5] Puterbaugh, Ch. Pl. and Pr., 145.

[6] The above form is constructed from the cases of Anderson v. Kanawha Coal Co., 12 W. Va. 526; Tingle v. Brison, 14 W. Va. 295; *ante*, §§ 812, 813.

It will be observed that the foregoing plea is classed as one in abatement, although if the issue be found in favor of the defendant it defeats the attachment sued out in the cause, yet it is properly so classed, because another affidavit may be filed and another order of attachment issued.

CHAPTER XLIII

PLEAS IN BAR

§ 1064. Of the statute of limitations.
§ 1065. Of the statute of frauds to a bill for specific performance.
§ 1066. Of dismissal of former suit for same matter.
§ 1067. Of judgment at law for same matter.
§ 1068. Of release.
§ 1069. Plea of stated account.
§ 1070. Of a will.
§ 1071. Of award.
§ 1072. Of purchaser for valuable consideration without notice.
§ 1073. To bill of interpleader.
§ 1074. That plaintiff not administrator as alleged, because supposed intestate is living.
§ 1075. To bill of discovery that another suit is pending for the same discovery.
§ 1076. The complainant has no interest in the lands, the title of which he seeks to discover.
§ 1077. That the discovery would subject defendant to forfeiture.
§ 1078. That discovery would compel the defendant to betray confidence as an attorney.
§ 1079. To a bill of reviror.
§ 1080. Of bankruptcy.

No. 205.

§ 1064. Of the statute of limitations.

[*As in No. 198 down to the *, and then as follows:*]

This defendant for plea to said bill says that if the complainant ever had any cause of action or suit against this defendant for or concerning any of the matters in the said bill mentioned, which this defendant doth in no sort admit, such cause of action or suit did accrue or arise above ——— years [*here insert the period in which the matter is barred*] next before the filing of the said bill, and next before serving or suing out process against this defendant to appear and answer said

bill; nor did this defendant at any time within ——— years next before the said bill was exhibited, or process served on or issued out against this defendant, to appear to answer the same, promise, or agree to come to any account for, or to make satisfaction, or to pay any sum or sums of money for or by reason of the said matters charged in said bill.

*All of which matters and things this defendant doth aver and plead in bar of the complainant's present bill of complaint, and prays the judgment of this court, whether he shall be compelled to make any further answer to said bill, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

C. D.,
By Counsel.[1]

G. H.,
Solicitor for the Defendant.

No. 206.

§ 1065. Of the statute of frauds to a bill for specific performance.

[*As in No. 198 to the *, and then as follows:*]

As to so much of said bill as seeks to compel this defendant to perform the agreement in said bill mentioned to have been made and entered into between the complainant and this defendant, for the sale by this defendant unto the complainant of a certain tract or parcel of land in the bill mentioned and described, or as seeks to compel this defendant to execute a conveyance of such tract or parcel of land to the complainant, pursuant to any such agreement, or as seeks any other relief relating to such tract or parcel of land, or as seeks any discovery from this defendant concerning any agreement made or entered into between the complainant and this defendant, for sale by this defendant to the complainant of the said tract or parcel of land, and not reduced into writing, signed by this

[1] See Hogg, Pl. and Forms, 249; Sands, Suit in Eq., 289, 290; Mitford and Tyler, Eq. Pl. and Pr., 595.

defendant, or some person by him thereunto lawfully authorized, for plea thereto this defendant says:

That neither this defendant, nor any person by him authorized, did ever sign any contract or agreement in writing for making and executing any sale or conveyance to the complainant of the land and premises in the bill mentioned and described, or any interest thereof, or to any such effect, or any memorandum or note in writing of any such agreement. All which this defendant doth aver and plead in bar to so much and such parts of said bill as seeks to compel this defendant to perform the agreement in said bill mentioned to have been made and entered into between the complainant and this defendant, and prays the judgment of this court whether he shall be compelled to make any further answer to so much of said bill as seeks to compel this defendant to perform the agreement in said bill mentioned as aforesaid, and prays to be hence dismissed as to this part of the plaintiff's bill with his reasonable costs in this behalf sustained.

C. D.,
By Counsel.

J. K.,
Solicitor for the Defendant.[2]

No. 207.

§ 1066. Of dismissal of former suit for same matter.

[*As in No. 198 to the *, and then as follows:*]

This defendant for plea to the said bill says that the said complainant heretofore, to-wit, on the ——— day of ———, 19—, exhibited his bill of complaint in the ——— court of ——— against this defendant, by which bill the said complainant sought to subject the land of this defendant, lying and being in the county of ———, containing ——— acres, and being the same land mentioned in the bill to which this is a plea, to the payment of the judgment of the said complainant,

[2] See Mitford and Tyler, Eq. Pl. and Pr., 595; 1 Daniell, Ch. Pl. and Pr (6th Am. Ed.), 561, 618, 619, 655, and note, 656, and note; Sands, Suit in Equity, 290.

being the same judgment mentioned in the present bill of complaint, and the said complainant in his said former bill of complaint alleged that that said judgment was a lien on the said land, as he has alleged in the present bill, and prayed for the identical relief against this defendant's said land that he has prayed for in his present bill; and to the said former bill this defendant filed his answer, denying that his said land was subject to the said judgment, and examinations of witnesses for the said complainant and for this defendant were had and taken, and said former bill of complaint with the said answer and the examinations of witnesses came to a hearing before the said ——— court of ———, and the said court, after full hearing thereof, on the ——— day of ———, 19—, dismissed the said former bill, and decreed and ordered that the said complainant should pay to this defendant his costs by him about his decree in that behalf expended; all which matters and things this defendant doth aver and plead in bar to the said present bill of complaint, wherefore this defendant prays judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and prays hence to be dismissed with his reasonable costs and charges, in this behalf most wrongfully sustained.

C. D.,
By Counsel.[3]

R. M.,
Solicitor for the Defendant.

No. 208.

§ 1067. Of judgment at law for same matter.

[*As in No. 198 to the *, and then as follows:*]

This defendant for plea to said bill says that before the institution of this suit and the filing of their present bill of complaint against this defendant, to-wit, on the ——— day of ———, 19—, the said complainants instituted their action at law in the ——— court of ——— against R. M. and this defendant, by which said action at law the said complainants

[3] The foregoing form is taken from Sands, Suit in Equity (2nd Ed.), 294.

demanded and claimed of the said R. M. and this defendant the sum of $———, with interest thereon from the ——— day of ———, 19—, as debt due by the said R. M. and this defendant to the said complainant; and the said R. M. and this defendant pleaded to the said action three several pleas, to-wit: the plea that the right of action did not accrue to the said plaintiff within five years prior to the institution of said action; the plea that the debt therein mentioned had been fully paid by the said R. M. and this defendant; and the plea that the action of the said complainant was founded on an usurious consideration, in this, that the debt therein demanded was for the loan and forbearance of money to the said R. M. and this defendant at a greater rate of interest than six per centum per annum; and issue being joined on the several pleas, the whole matter was submitted to a jury, who returned a verdict finding for the said R. M. and this defendant on all the pleas before mentioned, and the said ——— court of ——— thereupon gave judgment in favor of the said R. M. and this defendant, against the said complainant; and the debt set forth and declared in the said complainant's bill on which the attachment against this defendant's property issued is the same identical debt on which he, the said complainant, instituted his action aforesaid, and on the trial of which judgment went against the said complainant as aforesaid, all which matters and things this defendant doth aver and plead in bar to the said bill of complaint of the said complainants. [*Conclude as in No. 205 from the* *.]

C. D.,
By Counsel.[4]

L. M.,
Solicitor for the Defendant.

No. 209.

§ 1068. Of release.

[*As in No. 198 to the* *, *and then proceed as follows:*]

This defendant for plea to said bill says that previously to the complainant's bill being filed, to-wit, on the ——— day of

[4] The foregoing form is taken from Sands, Suit in Equity (2nd Ed.), 295.

———, 19—, the said complainant, in consideration of the sum of $———, then paid to him by this defendant, by a certain writing under his, complainant's, hand and seal, ready to be produced to this honorable court, did release and forever quitclaim this defendant *(among other things)* the several matters and things in the said complainant's bill mentioned and complained of, and an account of which is thereby sought against this defendant; and this defendant avers that the said release was freely and fairly given and executed by the said complainant, on the day the same bears date, and that the said complainant well knew the nature and effect thereof previously to executing the same; and that the sum of $———, so paid by this defendant to the said complainant, was a full and fair equivalent for any demand which the said complainant could or might have against this defendant in respect to the several matters therein and in the said bill also mentioned. Wherefore this defendant pleads the said release in bar of the said complainant's bill, and prays judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and prays hence to be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

C. D.,
By Counsel.[5]

J. M.,
Solicitor for the Defendant.

No. 210.

§ 1069. Plea of stated account.

[*As in No. 198 to the *, and then proceed as follows:*]

The defendant for plea to said bill says that on the ——— day of ———, 19—, which was previous to the filing of the said bill of complaint and the issuing of process thereon, the said complainant and this defendant did make up, state and settle an account in writing of all sums of money which this

[5] The foregoing form is taken from Sands, Suit in Equity (2nd Ed.), 298.

defendant had before that time, by the order and direction and for the use of the said complainant, received, and of all matters and things thereunto relating or at any time before the said ——— day of ———, 19—, being or depending between the said complainant and this defendant (and in respect whereof the said complainant's bill of complaint has been since filed); and the said complainant, after a strict examination of said account and every item and particular thereof, which this defendant avers, according to the best of his knowledge and belief, to be true and just, did approve and allow the same, and actually received from this defendant the sum of $———, the balance of the said account, which by the said account appeared to be justly due to him from this defendant, and the said complainant thereupon, and on the ——— day of ———, 19—, gave to this defendant a receipt or acquittance for the same under his hand in full of all demands, which said receipt or acquittance is in the words and figures following, that is to say: [*here copy the receipt*]; as by the said receipt or acquittance now in the possession of this defendant and ready to be produced to this honorable court will appear. [*Conclude the foregoing as in No. 205, from the* *.]

C. D.,
By Counsel.[6]

K. L.,
Solicitor for the Defendant.

No. 211.

§ 1070. Of a will.

[*As in No. 198 to the* *, *and then proceed as follows:*]

This defendant for plea to said bill says that the plaintiff claims to be heir-at-law of one John B., and to have inherited as such among other property a lot of land in the city of ———, fronting twenty feet on the south side of ——— street, between Fourth and Fifth streets, and running back *one hundred* and *fifty* feet to an alley; but this defendant avers that

[6] The foregoing form is taken from Sands, Suit in Equity (2nd Ed.), 296.

the said John B. being of sound mind and disposing memory prior to his death, made a last will and testament, and that the same has been duly admitted to probate in the chancery court of the city of R———; and this defendant further says, that by the said will so probated as aforesaid, the said John B. devised the said lot of land on ——— street to this defendant.

[*Conclude as in No. 205 from the* *.] C. D.,

J. M., By Counsel.[7]

Solicitor for the Defendant.

No. 212.

§ 1071. Of award.

[*As in No. 198 to the* *, *and then proceed as follows:*]

This defendant for plea to the said bill says that disputes having arisen between the said complainant and this defendant concerning [*here state subject of dispute*], for the settling of all which disputes the said complainant and this defendant agreed to submit the same to the final judgment, award and arbitration of A. R., and the said A. R. having taken upon himself the burden of said award, after having at large heard, read and duly weighed and considered all and singular the allegations, proofs and evidences brought before him, did on the ——— day of ———, 19—, make his final award in writing under his hand and seal of and concerning the matters of dispute aforesaid, and did thereby award and find [*here state substance of award*], as by the said award, reference being thereto had, will more fully appear; and this defendant avers that the matters complained of in said complainant's bill were

[7] The foregoing form is taken from Sands, Suit in Equity (2nd Ed.), 308.

This plea may be pleaded in bar to a bill "brought on a ground of equity by an heir at law against a devisee, to turn the devisee out of possession. But a will can not be pleaded to a bill by an heir at law praying for production of documents, and an injunction to restrain the defendants from setting up legal impediments, in an action of ejectment commenced by him against them." Sands, Suit in Equity (2nd Ed.), 266.

embraced in said award and thereby finally adjusted, settled and determined, and that the said award hath hitherto remained and still is unimpeached and in full force and effect; and this defendant avers that he hath paid in full to the said complainant the sum of money awarded to him by said award, and that the said award was made and said payment was made previously to the said complainant's bill being filed in this honorable court and the issuance of process thereon. [*Concluded as in No. 205, beginning at the* *.]

M. O.,
Solicitor for the Defendant.

C. D.,
By Counsel.[8]

No. 213.

§ 1072. Of purchaser for valuable consideration without notice.

[*As in No. 198 to the* *, *and then proceed thus:*]

This defendant, to so much of the said bill as seeks to subject the land in the bill mentioned to the payment of the judgment of the plaintiff recovered of the defendant, R. M., doth plead thereto, and for plea saith that A. B., previously to and on the ——— day of ———, 19—, was, or pretended to be, seized in fee simple, and was in, or pretended to be in, actual possession of all the said land, in the said bill particularly mentioned and described, free from all incumbrances whatsoever; and this defendant, believing that the said A. B. was so seized and entitled, and that the said land was in fact free from all incumbrances, on the ——— day of ———, 19—, agreed with the said A. B. for the absolute purchase of the fee simple and inheritance thereof; whereupon a deed was executed to the said defendant by the said A. B. conveying said land to the said defendant, and the same was thereupon duly recorded in Deed Book No. ———, at page ———, of the records in the office of the clerk of the county court of ——— county, in the state of ———, an attested copy of which is filed herewith, marked "Exhibit A," and made a part hereof; and this de-

[8] The foregoing form is taken from Sands, Suit in Equity (2nd Ed.), 301.

fendant doth aver that the said sum of $———, the consideration money in the said deed mentioned, was actually paid by this defendant to the said A. B., and this defendant doth also aver that at or before the time of the execution of the said deed by the said A. B. to this defendant, and the payment of the said purchase money, he, this defendant, had no notice whatsoever of the claim of the said R. M. to the said land, or of the said plaintiff, that in any wise affected the said land, so purchased by this defendant as aforesaid, or any part thereof; and this defendant insists that he is a *bona fide* purchaser of the said land for a good and valuable consideration, and without any notice of the said claim of said R. M., or of said plaintiff; all of which matters and things this defendant avers and pleads in bar to so much of the said complainant's bill as is hereinbefore particularly mentioned; and prays the judgment of this honorable court, whether he should make any further answer to so much of the said bill as is hereinbefore pleaded to; and this defendant, not waiving his said plea, but relying thereon, and for better supporting the same, for answer saith that he had not at any time before, or at the time of purchasing the said land, or since, until the said complainant's bill was filed, any notice whatsoever either expressed or implied of the said claim of said R. M. to the said land or of the said plaintiff, or that the same or any other incumbrance whatsoever was charged upon or in any wise affected the said land so purchased or any part thereof. [*Here may follow other statements in the answer. If, for example, particular instances of notice or circumstances of fraud are charged in the bill, they must be denied as specifically as charged in the bill and not evasively, and this special and particular denial of notice or fraud must be by way of answer. Conclude as No. 242.*]

J. K.,
Solicitor for the Defendant.

C. D.,
By Counsel.[9]

[9] The above form is taken from Sands, Suit in Equity (2nd Ed.), 309.

In Harrod v. Myers, 21 Ark. 592, 76 Am. Dec. 409, it is decided that the defense of purchase for valuable consideration without notice can not be made to a suit brought to cancel a deed on account of the grantor's infancy.

No. 214.

§ 1073. To bill of interpleader.

[*As in No. 198 to the *, and then proceed thus:*]

The defendant, for plea to said bill, says that he is advised that the complainant, by his bill, seeks to compel this defendant, and *John Jones*, another defendant to said bill, to interplead touching the sum of ——— dollars in his said bill mentioned to have been due from the complainant to the personal estate of *Nathan Hale*, deceased; to which bill this defendant doth plead, and for plea saith that the said *Nathan Hale*, in his lifetime, made his last will and testament and appointed this defendant sole executor thereof; and this defendant saith that since the death of said *Hale*, on the ——— day of ———, 19—, he hath duly proved his will before the ——— court of ——— county, in said state, and hath obtained letters of administration of the personal estate and effects of the said *Nathan Hale* to be granted to him by such court, as the executor named in the said last will; and therefore this defendant hath alone a right to receive the said sum of ——— dollars from the complainant, and to give him effectual discharge for the same; and this defendant doth aver that the title of the said *John Jones*, if any he has, to the said sum of ——— dollars, is by virtue of and under the said will of the said *Nathan Hale*, and as a specific legacy given to him by the said will. Wherefore this defendant is advised the complainant has no right to compel the said *John Jones* and this defendant to interplead, touching the said sum of ——— dollars. [*Conclude as in No. 202, beginning at the *.*]

C. D.,
By Counsel.

J. M.,
Solicitor for the Defendant.

No. 215.

§ 1074. That plaintiff not administrator as alleged, because supposed intestate is living.

[*As in No. 198 to the *, and then as follows:*]

The defendant for plea to said bill says that J. J. in the said bill named (to whom the said complainant alleges that he

has obtained letters of administration, and by virtue of which letters of administration, and also under the pretense of his being the heir-at-law of the said J. J., the said complainant has commenced and prosecuted this suit), was at the time the said complainant filed his said bill, and still is, alive at P———, in ——— [*here name the state or country*]. Therefore this defendant demands the judgment of this honorable court, whether he shall be compelled to answer the said complainant's bill; and humbly prays to be dismissed with his reasonable costs in this behalf sustained.

C. D.,
By Counsel.[10]

J. M.,
Solicitor for the Defendant.

[*Verify the foregoing plea by affidavit.*]

No. 216.

§ 1075. To bill of discovery that another suit is pending for the same discovery.

[*As in No. 198 to the *, and then proceed thus:*]

The defendant, for plea to so much and such part of the said complainant's bill as seeks a discovery from this defendant of [*here set out the discovery sought*], doth plead thereto, and for plea saith that long before the said complainant's bill was filed in this honorable court, and on or about the ——— day of ———, 19—, the said complainant commenced a suit in the ——— court of ——— against this defendant in respect of the matters as to which a discovery is sought by the complainant's bill in this suit, and that such other suit is still pending in the said court, which, as this defendant avers, is a court of competent jurisdiction to afford the discovery which the said

[10] The foregoing plea is taken from Curt., Eq. Prac., p 159.

The foregoing plea may either be one in abatement or in bar, according to the nature of the relief demanded. While it is classed here with pleas in bar, its verification is advised. If sworn to it does not affect its validity as a plea in bar, and if a plea in abatement it is required to be so verified.

complainant seeks by his said bill. Therefore this defendant avers and pleads the same to the said complainant's bill, and prays the judgment of this honorable court whether it will hold plea upon and enforce this defendant to answer the said complainant's said bill, for the cause aforesaid.

J. M., C. D.,
Solicitor for the Defendant. By Counsel.[11]

No. 217.

§ 1076. The complainant has no interest in the lands, the title of which he seeks to discover.

[*As in No. 198 to the *, and then as follows:*]

The defendants for plea to so much of the complainant's bill as seeks to compel these defendants to set forth and discover their respective titles in and to the lands and tenements in the bill of complaint mentioned, or any part thereof, say that the said complainant hath sold and conveyed away unto *John Jones,* of *Boston,* in the county of *Suffolk* and commonwealth of *Massachusetts,* all his estate, title, interest or claim of or to the said lands and tenements in his said bill of complaint mentioned. Wherefore these defendants are advised that the complainant has no interest of, in or to the said lands and tenements; and they therefore pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill of complaint in this particular, and pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

J. M., C. D. and E. F.,
Solicitor for the Defendants. By Counsel.[12]

[11] The foregoing form is taken from 3 Barb., Ch. Pr. (2nd Ed.), No. 331.

[12] The foregoing form will be found in 3 Barb., Ch. Pr. (2nd Ed.), No. 344.

No. 218.

§ 1077. That the discovery would subject defendant to forfeiture.

[*As in No. 198 to the *, and then as follows:*]

The defendant, to so much and such part of the said complainant's bill as seeks to compel this defendant to set forth and discover whether [*here set forth the discovery sought*], doth plead thereto, and for plea saith that to make the said discovery sought by the said bill would subject this defendant to the pains and penalties imposed by the laws and statutes of *Virginia* on those who [*here set forth the tenor of the statute imposing the penalty*]; and this defendant's answer to the said complainant's bill, in case he should thereby admit, etc., might be received and read in evidence against him, this defendant, in the proper court of this state, in any suit or prosecution to be there commenced against him, this defendant, for such offense. Wherefore this defendant doth plead the several matters aforesaid, in bar to such discovery as aforesaid as is sought by the said bill, and humbly prays the judgment of this honorable court whether he is bound to make any further or other answer thereto.

C. D.,
By Counsel.[13]

M. N.,
Solicitor for the Defendant.

No. 219.

§ 1078. That the discovery would compel the defendant to betray confidence as an attorney.

[*As in No. 198 to the *, and then as follows:*]

The defendant, to so much and such part of said bill as seeks a discovery from this defendant of the title of W. W., another defendant in the said bill named, to all or any of the lands, tenements, or hereditaments, late of C. W., his late grand-

[13] The foregoing form is taken from Sands, Suit in Equity (2nd Ed.), 315.

father, deceased, in the said bill also named, doth plead thereto, and for plea saith that he, this defendant, is a duly admitted and sworn attorney at law, duly licensed and practicing as such in the courts of ———, and has for several years past practiced, and now practices as such; that this defendant was employed by C. W., deceased, the late father of the said other defendant, W. W., in the lifetime of the said C. W., and since his decease hath also been employed in that capacity by the said other defendant, J. W., the mother and guardian of the said W. W., and likewise by the said W. W. since he attained his age of twenty-one years; and in that capacity only, or by means of such employment only, hath had the inspection and perusal of any of the title deeds of and belonging to the said estate, or any part or parts thereof for the use and service of his said clients, and therefore ought not, as this defendant is advised, to be compelled to discover the same. Wherefore this defendant doth plead the several matters aforesaid in bar to such discovery as aforesaid as is sought by the said bill and humbly prays the judgment of this honorable court whether he is bound to make any further or other answer thereto.

J. M.,
Solicitor for the Defendant.

C. D.,
By Counsel.[14]

No. 220.

§ 1079. To a bill of revivor.

[*As in No. 198 to the *, and then proceed thus:*]

The defendant, for plea to said bill, says that the said plaintiff is not, as stated in the said bill of revivor, the personal representative of A. B., deceased, the testator therein named, and as such entitled to revive the said suit in the said bill of revivor mentioned, against this defendant; but the said plaintiff is the administrator only of E. F., deceased, who died

[14] The foregoing form is taken from Sands, Suit in Equity (2nd Ed.), 314.

intestate on the ——— day of ———, 19—, last, and was sole executor of the said A. B.; and that letters of administration of the goods and estate of the said A. B. unadministered by the said E. F. in his lifetime have since the death of the said E. F. been duly granted by the proper court to G. H., who thereby became, and now is, the legal personal representative of the said A. B. Wherefore the said defendant demands judgment of this honorable court, whether he shall be compelled to answer the said plaintiff's bill, and humbly prays to be dismissed with his reasonable costs in this behalf sustained.

J. M., C. D.,
Solicitor for the Defendant. By Counsel.[15]

No. 220*a*.

§ 1080. Of bankruptcy.

A——— B———
v.
C——— D———, } In Chancery.
E——— F——— and
G——— H———.

In the Circuit Court in the County of ——— and State of ———.

The defendant, G. H., for plea to said bill, says that this defendant, on the ——— day of *August, 1899,* at that time residing in the district of ———, by petition setting forth to the best of his knowledge and belief the name of his creditors, their respective places of residence, the amount due each, together with an accurate inventory of his property, rights and chattels of every kind and description and the location and situation of each and every parcel and portion thereof, verified by his oath, applied to the district court of the United States of the said district of ———, by filing said petition in the office of the clerk of said district court for the benefit of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1,

[15] The foregoing form is taken from Mitford & Tyler, Pl. and Pr. in Equity, 596.

1898, and in said petition he, the said G. H., declared himself unable to meet his debts and engagements.

And the said defendant further in fact says that on the *21st* day of *August, 1899*, at ———, in said district, upon the hearing upon said petition by said district court, defendant was declared a bankrupt by a decree of said court.

And the said defendant further in fact says that on the ——— day of *August, 1899*, he filed his petition in the office of the clerk of said district court, which had declared him a bankrupt, for a full discharge from all his debts provable in said bankruptcy, to be decreed and allowed, and a certificate thereof granted him by said district court.

And said defendant further in fact says that he *bona fide* surrendered all his property and all rights of property as required by said act of Congress, with the exceptions in said act mentioned, for the benefit of his creditors, and fully complied with and obeyed all the orders and directions, which from time to time by said court had been entered, and otherwise conformed to all other requirements of said act of Congress.

And said defendant further in fact says that said district court at ——— in said district on the ——— day of *January, 1900*, decreed and allowed said defendant a full discharge from all his debts provable under said act of Congress in said matter of bankruptcy, and on the ——— day of *January, 1900*, granted him a certificate of such discharge.

And said defendant further in fact says that said claim of A. B., now sued on, at the time of defendant's filing said petition on the ——— day of *August, 1899*, to be declared a bankrupt, was set forth in said petition and fully described, and was at that time a subsisting claim and then was and ever since has been provable under said act of Congress in said matter of bankruptcy, and this the said defendant is ready to verify.

[*Conclude as in No. 205 from the* *.] G. H.,

J. M., By Counsel.[16]

Solicitor for the Defendant.

[16] The foregoing form is constructed from the provisions of "An act to establish a uniform system of bankruptcy throughout the United States," passed by Congress in 1898.

CHAPTER XLIV

DISCLAIMER

§ 1081. A single disclaimer.
§ 1082. Answer and disclaimer.

No. 221.

§ 1081. A single disclaimer.

State of ———,
——— County, } ss:

In the Circuit Court of said County.

A——— B———
v. } In Chancery.
C——— D———.

This defendant, saving and reserving to himself, now and at all times hereafter, all manner of advantage and benefit of exceptions and otherwise that can or may be had and taken to the many untruths, uncertainties and imperfections in the said complainant's bill of complaint contained, for answer thereunto, or unto so much, or such part thereof as is material for this defendant to make answer unto, answers and says that he fully and absolutely disclaims all manner of right, title and interest whatsoever in and to the legacy of ——— dollars in said bill of complaint mentioned, and all other the estate and effects of the said *Thomas Atkins,* deceased, in the said bill named, and in and to every part thereof; and this defendant denies all and all manner of unlawful combination and confederacy unjustly charged against him in and by the said bill of complaint, without this that any other matter or thing in said bill contained, material or necessary for this defendant to

make answer unto, and not herein well and sufficiently answered unto, confessed or avoided, traversed or denied, is true; all of which matters and things this defendant is ready to aver, maintain and prove, as this honorable court shall direct and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

R. S., C. D.,
Solicitor for the Defendant. By Counsel.[1]

[*If the case be one in which an answer must be verified, then verify the disclaimer.*]

No. 222.

§ 1082. Answer and disclaimer.

[*After the title and commencement, as the case may require, as shown in Chapter XLV, §§ 1083-1087, proceed as follows*]: that he, this defendant, on behalf of E. F., one of the other defendants in the said bill named, did about ——— years ago contract and agree with G. H. for the purchase of the lands and tenements, etc., now in question, and in possession of L. M., in the said bill also named, and another defendant thereto, which said lands and tenements, etc., at that time were, and for above ——— years before had been, in the possession of the said G. H. and J. K., in the said bill also named, or one of them, and for the purchase whereof this defendant, on behalf of the said defendant, E. F., agreed to give, and accordingly did give and pay to the said G. H., the sum of ——— dollars, and in consideration thereof the said G. H., and N., his wife, by deed bearing date on the ——— day of ———, 19—, duly conveyed the said lands and tenements to the said E. F., who thereupon and under and by virtue of such conveyance as this defendant has heard and believes, and so avers, entered on and became seized of the said lands and tenements, and continued so seized thereof without any entry or claim

[1] The above form will be found in Puterbaugh, Ch. Pl. and Pr. (3d Ed.), 184.

made by the complainant, or any other person or persons, until the ——— day of ———, in the year ———, when the said E. F., as this defendant has heard and believes and so alleges by good and sufficient conveyance in the law, and in consideration of the sum of ——— dollars, *bona fide paid,* sold and conveyed the said lands and tenements to the said defendant, L. M., and his heirs, who thereupon entered thereon, and was and yet is seized and possessed of the same; and this defendant answering, says he does not know, nor can he set forth, as to his belief or otherwise, whether R. S., in the said bill named, was ever seized of the said premises, or any part thereof; and this defendant further answering, says he has been advised and believes and so states that the said G. H., and N., his wife, had good right and title to sell and convey the said premises so purchased by this defendant on behalf of the said E. F., as aforesaid; and this defendant further answering, says he denies that he ever had any notice of any right or title that the complainant, or any other person, save as aforesaid, had or might, or could claim, of, in or to the said lands and tenements, or any part thereof; and this defendant says that he never had or claimed, or pretended to have, nor has he now, nor does he claim or pretend to have any right, title or interest of, in or to the said premises, or any part thereof; and this defendant disclaims all right and title of, in and to the same, and every part thereof. [*Conclude as in either No. 241 or 242, at the option of the pleader.*]

C. D.,
By Counsel.[2]

C. K.,
Solicitor for the Defendant.

[2] The foregoing form is taken from Puterbaugh, Ch. Pl. and Pr. (3d Ed.), 185.

CHAPTER XLV

THE ANSWER

§ 1083. Of answer by one defendant.
§ 1084. Joint and several answer.
§ 1085. Of one of several defendants.
§ 1086. To an answer of one defendant.
§ 1087. To an answer of several defendants.
§ 1088. Where defendant admits a statement.
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§ 1091. Where a schedule of deeds is required to be set forth in the answer.
§ 1092. Where an account of rents, or moneys received, or paid, is required to be set forth by several defendants.
§ 1093. Accounts.—Reference to books containing them.
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§ 1110. To a bill for divorce setting up recrimination.
§ 1111. To a bill for divorce setting up a claim to affirmative relief.
§ 1112. Of garnishee in attachment suit.
§ 1113. An amended answer.
§ 1114. Amended answer after exceptions sustained to the original.
§ 1115. Setting up partition by a parol agreement to a suit for partition.

THE TITLE.

No. 223.

§ 1083. Of answer by one defendant.

The answer of C. D., the defendant, to the bill of complaint of A. B., filed against him * in the circuit court of the county of ———, and state of ———.

Or:

The answer of C. D., the defendant, to a bill of complaint filed against him in the circuit court of the county of ———, state of ———, by A. B., plaintiff.[1]

No. 224.

§ 1084. Joint and several answer.

The joint and several answer of C. D. and E. F., the defendants to the bill of complaint of A. B., filed against them [*then continue from the * as in form No. 223*].[2]

No. 225.

§ 1085. Of one of several defendants.

The answer of C. D., one of the defendants, to the bill of complaint of A. B., filed against him and others [*or* another,

[1] This form, as here given, will be found in 2 Bart., Ch. Pr. (2nd Ed.), 1299; Puterbaugh, Ch. Pl. and Pr. (3d Ed.), 174.

[2] Taken from Puterbaugh, Ch. Pl. and Pr. (3d Ed.), 175; Lube, Eq. Pl., 492.

"Two or more persons may join in the same answer, and where their interests are the same and they appear by the same counsel, they ought to do so, unless some good reason exists for answering separately. 2 Dan., Ch. Pr. (Old), 265; Dan., Ch. Pr. (Perk.), 742. Where two defendants answer jointly and one speaks positively for himself, the other may in cases where he is not charged with anything upon his own knowledge, say that he had perused the answer and believes it to be true. 1 Har. Ch. 185; but, adds, Harrison, it is otherwise where the defendants answer separately. *Ibid.* We have no decision in the Virginia state courts adopting this rule. No reason is perceived why an answer of one defendant adopting *totidem verbis* the answer of another should not be deemed sufficient." Sands, Suit in Equity (2nd Ed.), 344.

*as the case may be; then continue from the * as in form No. 223*].[3]

THE COMMENCEMENT.

No. 226.

§ 1086. To an answer of one defendant.

This defendant, now and at all times hereafter saving to himself all manner of benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for him to make answer unto, answering, says, etc.

Or thus:

This defendant, reserving to himself all right of exception to the said bill of complaint, for answer thereto, says, etc.[4]

No. 227.

§ 1087. To an answer of several defendants.

These defendants, now and at all times hereafter saving and reserving to themselves, and each of them, all benefit and advantage of exception or otherwise, that can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them, or any of them, to make answer unto, severally answering, say, etc.

Or thus:

These defendants, reserving to themselves all right of exception to the said bill of complaint, for answer thereto, say, etc.[5]

[3] *Idem.* See *ante*, §§ 423, 424, where various forms of titles or captions are given.

[4] The above form is taken from Puterbaugh, Ch. Pl. and Pr. (3d Ed.), 175.

As to what is said as to the reservation of exceptions to the bill made in an answer, see *ante*, § 426.

[5] See Puterbaugh, Ch. Pl. and Pr. (3d Ed.), 176.

COMMON FORMS OF VARIOUS AVERMENTS USED IN FRAMING ANSWERS.

No. 228.

§ 1088. Where defendant admits a statement.

And this defendant further answering saith he hath been informed and believes it to be true that, etc. *Or,* this defendant admits that, etc.[6]

No. 229.

§ 1089. Where a defendant believes a statement may be true, but qualifies his admission of it not knowing the same of his own knowledge.

And this defendant further answering saith he believes it to be true that at the time of his said testator's making his said will and at the time of his death the said testator's sister, Jane, the wife of ———, in the said will named, had such children as therein in that behalf named, but this defendant does not know the same of his own knowledge, nor can this defendant state as to his belief or otherwise whether she had or not any other children or child at such times or either of them.

Or thus:

And this defendant further saith he has never heard or been informed save by the said complainant's said bill whether, etc., but this defendant believes that, etc., as in the said bill is alleged.[7]

No. 230.

§ 1090. Where defendant is entirely ignorant with regard to the statement in the bill.

And this defendant further answering saith he knows not, and has not been informed save by the said complainant's said

[6] The above form is taken from Equity Draftsman, 566.

[7] The above form is taken from Equity Draftsman, 566.

bill, and can not set forth as to belief or otherwise, whether the said complainant has or not applied for or procured letters of administration of the goods, chattels, rights and credits of the said A. B. to be granted to her by and out of the proper or any or what ——— court, nor whether, etc.

Or thus:

And this defendant further answering saith it may be true for anything this defendant knows to the contrary that, etc., but this defendant is an utter stranger to all and every such matters, and can not form any belief concerning the same.[8]

No. 231.

§ 1091. Where a schedule of deeds is required to be set forth in the answer.

And this defendant further saith he hath in the schedule to this, his answer, annexed or underwritten, and which he prays may be taken as part thereof, set forth according to the best and utmost of his knowledge, remembrance, information and belief, a full, true and particular list or schedule of all deeds, etc., and this defendant is ready and willing to produce and leave the same in the hands of the clerk of this court for the usual purposes.[9]

No. 232.

§ 1092. Where an account of rents, or moneys received, or paid, is required to be set forth by several defendants.

And these defendants further severally answering say they have in the *(first)* schedule to this their answer annexed or underwritten, and which they pray may be taken as part thereof, set forth according to the best and utmost of their several and respective knowledge, remembrance, information and belief, a full, true and particular account of all and every sum

[8] The foregoing form is taken from Equity Draftsman, 567.

[9] The foregoing form is taken from Equity Draftsman, 568.

and sums of money, etc. [*Or, if an account required as to the real estate, thus:* A full, true and just rental and particular of all and singular the real estate, etc.][10]

No. 233.

§ 1093. Accounts—Reference to books containing them.

The dealings and transactions in respect of the said trade are entered in a large book, or ledger, kept on the premises at ———, and the items in respect thereof are contained in one hundred and sixty-four pages, with double columns, of the said book; and to set out such items in detail would occasion very great expense; but the respondents are willing, if the court shall think proper so to direct, that the plaintiff or his solicitor should inspect the said book and take extracts therefrom at all reasonable times of the day.[11]

No. 234.

§ 1094. Accounts refused as being useless before decree.

And respondents say and submit that it would only occasion great and useless expense were they in this their answer to set forth any further or fuller account of the rents and profits aforesaid; and that the same ought to be taken, if at all, by and under the directions and decree of this honorable court.[12]

No. 235.

§ 1095. Admission for purpose of the suit.

These defendants have no personal knowledge of the fact, but, for the purpose of the suit, they admit that, etc.

Or:

And this defendant further answering saith he hath been informed and believes it to be true that, etc. *Or,* this defendant admits that, etc.[13]

[10] The foregoing form is taken from Equity Draftsman, 568.

[11] The above form is taken from Lube, Eq. Pl., 494.

[12] The above form is taken from Lube, Eq Pl., 494, 495.

[13] The foregoing form is taken from Lube, Eq. Pl., 495.

No. 236.

§ 1096. Reference to schedule.

This respondent has in the ——— schedule hereto annexed, and which he prays may be taken as part of this his answer, set forth, to the best of his knowledge, information and belief, a description of, etc.[14]

No. 237.

§ 1097. Settled accounts—Claim of.

The account so stated and settled was in fact stated and settled by the said A. B. and this respondent, as it purports to be, on the day of the date thereof; and respondent claims the benefit thereof as a settled account.[15]

No. 238.

§ 1098. Submission by trustee to act.

The defendants submit in all things to act as this honorable court shall direct, and they claim to have their costs, charges and expenses, properly incurred, paid out of the estate of the said testator.[16]

No. 239.

§ 1099. Where the defendant relies upon the statute of frauds.

And this defendant says that by the statute of ———, it is, among other things, provided that no action shall be brought whereby to charge any person upon any contract of any lands, tenements and hereditaments, or any interest in or concerning

[14] The foregoing form is taken from Lube, Eq. Pl., 497.

[15] The foregoing form is taken from Lube, Eq. Pl., 497.

[16] The foregoing form is taken from Lube, Eq. Pl., 497, 498.

them, unless the agreement upon which such action should be brought, or some memorandum or note thereof, in writing shall be signed by the said party to be charged therewith, or some other person by him lawfully authorized [*give the language of the statute*]; and this defendant insists upon the said statute, and claims the same benefit as if he had pleaded the same.[17]

No. 240.

§ 1100. Where the defendant relies upon the statute of limitations.

The defendant also relies upon the statute of limitations as a defense to the plaintiff's demands, to the same extent and as fully as if the same were formally here pleaded to the plaintiff's bill.[18]

THE CONCLUSION

No. 241.

§ 1101. A formal general conclusion.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter, cause or thing in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters

[17] See Puterbaugh, Ch. Pl. and Pr. (3d Ed.), 180; *ante*, § 459.

[18] Tazwell v. Whittle, 13 Gratt. (Va.) 329, in which the court holds that anything in an answer which will apprise the plaintiff that the defendant relies on the statute of limitations is sufficient, if such facts are stated as are necessary to show that the statute is applicable. But even under the language of this decision, this informal method of pleading the statute will be good only when the pleadings in connection with other allegations disclose proper facts for application of the statute.

and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.[19]

Or:

And now, having fully answered the complainant's bill, and denying all unlawful combination and confederacy as therein charged [*when combination is charged*], this respondent prays hence to be dismissed with his reasonable costs in this behalf expended, and he will ever pray, etc.[20]

No. 242.

§ 1102. The usual conclusion.

And now, having fully answered plaintiff's bill, this respondent prays hence to be dismissed with his reasonable costs in this behalf expended, and he will ever pray, etc.[21]

PRECEDENTS OF ANSWERS IN SOME PARTICULAR INSTANCES AND CASES.

No. 243.

§ 1103. Of an infant defendant by his guardian ad litem.

The separate answer of *Anne Hart*, an infant under the age of twenty-one years, by B. T., her guardian *ad litem*, assigned to defend her in this suit, to a bill of complaint exhibited against her and others, in the circuit court for the county of ———, and state of ———, by *James Hart*.

The respondent, reserving to herself the benefit of all just exceptions to said bill, for answer thereto, or to so much thereof as she is advised that it is material she should answer, by her said guardian *ad litem*, answers and says:

That she is an infant of tender years, and by reason of her infancy is incapable of understanding, or of taking care of

[19] The above form is taken from Lube. Eq. Pl., 494.

[20] The above form is taken from Sands, Suit in Equity, 359, 360.

[21] *Ante*, § 407.

her rights and interest. She, therefore, by her said guardian, commends herself and her rights and interests to the protection of the court, and prays that no decree may be pronounced which will tend to her prejudice.

And having fully answered, the said respondent prays to be hence dismissed with her reasonable costs in this behalf expended, and she will ever pray, etc.[22]

B——— T———,
Guardian *ad litem* for Anne Hart.

No. 244.

§ 1104. Of an infant to a bill or petition to sell his estate, as well also as of the guardian ad litem himself.

The answer of John H., guardian *ad litem* to the infant defendant, Robert P., and the answer of the said infant defendant, Robert P., by the said John H., his guardian *ad litem*, to the bill in equity exhibited against the said Robert P. and others in the ——— court of ——— county, state of ———, by James S., guardian of the said Robert P.

For answer to the said bill the said guardian *ad litem* answers and says that he does not know whether the interests of the infant defendant would be promoted by the sale of the property as prayed for in the said bill or not; and the said infant defendant, by his said guardian *ad litem*, answers and says that being an infant of tender years he knows nothing of

[22] The foregoing form is taken from 2 Bart., Ch. Pr. (2nd Ed.), 1300. See Durrett v. Davis, 24 Gratt. (Va.) 302.

"There is nothing in the contention that the guardian *ad litem* did not properly sign his name. The answer purports to be made by the infant defendant, 'by his guardian *ad litem*.' What difference does it make whether he signs it 'George Thompson, by J. B. Wilkinson, his guardian *ad litem*'; or 'J. B. Wilkinson, guardian *at litem* for George Thompson'? Either form of signature shows the answer to be the guardian's act on behalf of his ward." Thompson v. Buffalo Land & Coal Co., 77 W. Va. 782, 787, 88 S. E. 1040.

the matters mentioned in the bill, and commits the protection of his interests to the court. And now having answered they pray, etc.

John H., Guardian *ad litem* to
Robert P., and Robert P., an
infant, by the said John H.,
his guardian *ad litem.*[23]

[*Verify by affidavit.*]

No. 245.

§ 1105. A short and usual form for an answer.

[*After the usual title.*]

The respondent [*or,* these respondents] reserving to himself [*or,* themselves] the benefit of all just exceptions to the said bill, for answer thereto, or to so much thereof as he is [*or,* they are] advised that it is material he [*or,* they] should answer, answers and says [*or,* answer and say] that ———.

True it is, etc. [*giving a distinct and categorical answer to the several averments of the bill*].

But this respondent denies [*here insert the denial of such allegations of the bill as are not true*].

And this respondent denies [*or,* these respondents deny] all fraud, unlawful combination and confederacy; and having fully answered the complainant's bill, prays [*or,* pray] to be hence dismissed with his [*or,* their] reasonable costs by him [*or,* them] in this behalf expended, and he [*or,* they] will ever pray, etc.

D. D.,
Defendant,
By Counsel.[24]

M. A. W.,
Solicitor for the Defendant.

[23] The above form is taken from Sands, Suit in Equity, 549.

[24] The above form is taken from 2 Bart., Ch. Pr. (2nd Ed.), 1300.

No. 246.

§ 1106. To a bill for an injunction to stay proceedings at law on a judgment, drawn to illustrate the principle permitting all defenses in equity to be made by answer.

[*After the title and commencement proceed as follows:*]

This defendant admits that, at ——— term of ——— court of ———, he recovered a judgment against the complainant for the sum of $———, being the amount due him, as the holder of certain promissory notes, mentioned and described in the bill of complaint, as drawn by the said complainant, payable to one B., and by him indorsed to this defendant. And as the said judgment was recovered without any fraud on his part, etc., it remains in full force and unreversed; and as all the objections now pretended against it in said bill were inquirable into at law, and if shown to be true, might have been used as defenses in his aforesaid action at law, this defendant relies on his aforesaid judgment, and pleads the same in bar of all the relief which the complainant now seeks by his bill.

And this defendant avers that he knows nothing whatever of the transaction between the complainant and the said B., and out of which the pretended equities of the complainant are supposed to arise, and can neither admit nor deny the charges in the bill in that behalf. He insists that all inquiry into these matters is precluded by the judgment aforesaid; but if it shall be considered by this court that they are still open for examination in this suit, he is advised to insist that the said B. is a necessary party to this suit to aid this defendant in the defense thereof.

And this defendant avers that he acquired the aforesaid promissory notes before they or any of them became payable, *bona fide* for a full and valuable consideration, and without notice of any of the equities or defenses now pretended by the complainant against them; and he is therefore advised and insists that his right as the holder thereof can not be affected

by proof now adduced of any latent equities existing between the original parties to the said notes.

And as to the matters of account which are pretended in said bill to be remaining unsettled between the complainant and this defendant, in respect of which a large balance of money is pretended to be due from this defendant to the complainant, this defendant says that upon complainant's own showing they are matters for the cognizance of a court of common law, and he therefore insists that this court has no jurisdiction to examine into them, or to grant any relief to the complainant in respect thereof; and he more especially relies on and pleads the judgment aforesaid against the claim of the said complainant to have the balance to be found due on the taking an account of the aforesaid matters set off or discounted from the sum recovered by said judgment.

And this defendant further says that if the complainant ever had any cause of suit or action against this defendant for or in respect of the aforesaid matters of account, or any of them, the same did accrue unto him upwards of ——— years before the filing of the present bill, or suing out process thereon against this defendant, and upwards of ——— years before this defendant became the holder of the aforesaid promissory notes; and he pleads the act for limitations of actions and so forth against all the relief which the complainant seeks in respect thereof.

And this defendant, insisting on his aforesaid defenses, and praying to have the same benefit thereof as if they were herein specially pleaded, for further answer admits, etc., etc. [*Answer the several allegations in the bill; and if the bill charged fraud and combination, the answer should conclude as follows:*]

And this defendant denies all and all manner of fraud and conspiracy with which he is charged by said bill, and prays that the injunction heretofore granted in this cause may be dissolved, and that he may be hence dismissed, with his reason-

able costs in this cause sustained. And as in duty bound he will ever pray, etc.[25]

[*Since the injunction bill would be verified, by force of the statute the answer to the bill must also be verified by oath.*]

No. 247.

§ 1107. In the nature of a cross-bill setting up a claim to affirmative relief.

[*After the usual title and commencement:*] that this defendant admits that he and the said plaintiff were duly married on the ——— day of ———, 19—, as alleged in plaintiff's said bill.

And this defendant, further answering says, that it is true that there was born unto the plaintiff and defendant the children named in the said bill, whose ages are as therein stated.

This defendant, for further answer unto the said bill, says that he denies [*here set forth the matters denied*].

And now this defendant, for further answer unto said bill, setting up a claim to affirmative relief against the said plaintiff, answering, says, that on or about the ——— day of ———, 19—, the said plaintiff committed the crime of adultery with one E——— F———, at or near [*here insert the place, if known*]; and as soon as this defendant learned that the plaintiff had committed the said offense, he ceased to cohabit with her and never since then has cohabited with her.

Plaintiff therefore prays that the said A——— B——— may be made a defendant to this answer setting up a claim to affirmative relief; that plaintiff may have a divorce from the bonds of matrimony from the said A——— B———, upon the ground hereinbefore set forth; and that said defendant may be dismissed with his costs as to the plaintiff's said bill; and grant unto the defendant such other relief as the nature of his

[25] The foregoing form is taken from Mitford & Tyler, Pl. and Pr., 609.

case as set forth in this, his answer, may require, and as in duty bound he will ever pray, etc.

C——— B———,
By Counsel.

C——— F——— C———,
Solicitor for the Defendant.

No. 248.

§ 1108. Averring fraud in procuring contract sought to be enforced.

[*After the usual title and commencement:*] that the instrument set forth in the plaintiff's bill upon which this suit is founded was procured from the defendant by the plaintiff by fraud and misrepresentation, in this [*set forth the particular circumstances constituting the fraud*].

The said defendant says that said representations made by the plaintiff were false, as he then well knew, but the defendant relying upon the same, and believing them to be true, executed and delivered the said writing to the plaintiff.

The defendant further says that the inducements to entering into the said writing were the said fraudulent representations of the said plaintiff, and but for them this defendant would not have executed and delivered said writing to the plaintiff.

This defendant therefore prays that said instrument may be declared void, and delivered up to be canceled, and that defendant may be hence dismissed with his reasonable costs in this behalf incurred, and as in duty bound, he will ever pray, etc.

C——— D———,
By Counsel.[26]

J——— U——— M———,
Solicitor for the Defendant.

[26] See 2 Thornton, Ind. Prac. Forms, 926.

No. 249.

§ 1109. To a bill for divorce setting up condonation.

[*After the usual title and commencement:*] that he, the defendant, admits the marriage alleged in said bill.

The defendant for further answer unto said bill says, that after the times mentioned in said bill, and before the commencement of this suit, the plaintiff being informed as to the matters therein alleged, freely condoned said alleged adultery, and forgave the defendant therefor, and freely cohabited with him, and that ever since such condonation the defendant has been a faithful husband to the plaintiff, and has constantly treated her with conjugal kindness.

C——— D———,
By Counsel.

J——— S——— S———,
Solicitor for the Defendant.

[*The defendant in person must verify this answer by his oath.*][27]

No. 250.

§ 1110. To a bill for divorce setting up recrimination.

[*After the usual title and commencement:*] that he, this defendant, admits that the plaintiff is a resident of ——— county, and has resided in the state of West Virginia for the period of one year immediately preceding the institution of her suit, and that plaintiff and defendant were married as alleged in said bill.

Defendant further alleges that on or about the first day of ———, 19—, the plaintiff [*here state a cause for divorce, and as in a bill brought for the purpose*].

Defendant further says that after such offense was com-

[27] See W. Va. Code, 1916, c. 64, § 8; Acts 1915, c. 73.

mitted defendant separated from plaintiff, and since said time has not cohabited with plaintiff or forgiven her offense.

[*Conclude the answer in the usual manner.*]

C——— D———,

J——— F———, By Counsel.

Solicitor for the Defendant.

[*The defendant in person must verify this answer by his oath.*][28]

No. 251.

§ 1111. To a bill for divorce setting up a claim to affirmative relief.

[*After the usual title and commencement.*]

The defendant says that he, the defendant, admits that plaintiff is a resident of M——— county, and that she has resided in the state of ——— for the period of ——— years immediately preceding the institution of her suit.

The defendant, for further answer to said bill, says that he admits that the plaintiff and defendant were married, as set forth in said bill.

And now this defendant for further answer unto said bill, and by way of a claim for affirmative relief, says that the defendant avers that he is a resident of M——— county, and has resided in the state of ——— for the period of ——— years immediately preceding the institution of this suit.

Defendant further says that he and the said plaintiff were married, as set forth and alleged in the plaintiff's said bill.

Defendant, further answering, says that [*here allege cause for divorce as in a bill of complaint*].

This defendant now prays that the said A——— B——— may be made a defendant to this answer setting up a claim to affirmative relief, and that she be required to answer the same; that he may have a divorce from the said A——— B———

[28] *Idem.*

from [*here pray for the kind of divorce, depending upon the allegations of the answer claiming affirmative relief*]; that the plaintiff's bill may be dismissed as to this defendant; and that defendant may have such other relief as the nature of his case, as set forth in his answer, wherein he claims affirmative relief, may require, and as to equity may seem meet, and as in duty bound he will ever pray, etc.

C——— D———,
By Counsel.[29]

J——— F——— A———,
Solicitor for the Defendant.

[*The defendant in person must verify this answer by his oath.*][30]

No. 252.

§ 1112. Of garnishee in attachment suit.

[*After the usual title and commencement:*] that this defendant, at the time of the service of the plaintiff's order of attachment in this suit upon him, had not in his hands or possession any goods, effects or credits of the said defendant, E——— F———, nor any property belonging to the said defendant, E——— F———, in his possession or under his control.

Defendant further says that, since the said order of attachment was served upon this defendant, no goods, effects or credits belonging to the defendant, E——— F———, have come into the hands, possession, or under the control of this defendant; that this defendant is not in any wise liable upon any matter whatsoever, either now or at the time said order of attachment was served upon him, to his said codefendant, E——— F———. [*Or if, on the contrary, the said garnishee was indebted when the said order of attachment was served upon him, or had in his possession property, or effects of the defendant, or if any property or effects came into his hands*

[29] See Jones v. Jones, 71 Hun (N. Y.) 519, 24 N. Y. S. 1031, 54 N. Y. St. Rep. 885.

[30] See W. Va. Code, 1916, c. 64, § 8; Acts 1915, c. 73.

belonging to the defendant, after the service of the said order of attachment, then the answer should state fully the nature of such property and the amount or value thereof.]

This defendant now, having fully answered, prays to be hence dismissed with his reasonable costs in this behalf incurred, and as in duty bound he will ever pray, etc.

C——— D———,
By Counsel.[31]

F——— T———,
Solicitor for the Defendant.

No. 253.

§ 1113. An amended answer.

[*After the style of the cause, as in No. 191 to the* *.]

The amended [*or,* supplemental] answer of R. D., to the bill filed against him and others in this cause. This defendant, in addition to [*or,* in explanation of; *or,* in correction of] the answer heretofore filed by him in this cause, leave of the court having been obtained, says that [*here set out the additions, explanations, or corrections, stated or referred to in the order of the court allowing the amended or supplemental answer to be filed; and conclude as in an ordinary answer*].[32]

No. 254.

§ 1114. Amended answer after exceptions sustained to the original.

[*After the style of the cause, as in No. 191 to the* *.]

The further answer of C. D., defendant in this suit, to the original bill of complaint, and his answer to the amendments to such bill.

[31] See as to the duty of the garnishee to defend the suit, and the answer he should make thereto, *ante,* §§ 833-838.

[32] The above form is taken from Gibs., Suit in Ch., § 438.

This defendant, saving and reserving to himself the same benefit of exception to the said original and amended bill as by his former answer to such original bill is saved and reserved, for answer thereto, answers and says:

This defendant, in further answer to such original bill, as to the matters to the third exception taken to his former answer, saith that [*here set forth the matter introduced*].

And this defendant, in further answer to such original bill, in the matters of the sixth exception taken to his former answer, saith [*here insert the matter*].

And this defendant for answer to the amendments made to such original bill, saith that [*here insert the matter*].

[*Here append the usual conclusion to the answer.*][33]

No. 255.

§ 1115. Setting up partition by a parol agreement to a suit for partition.

[*After the usual caption and commencement:*] that in the year *1894* the plaintiffs and defendant, being the owners in common of the lands in said complaint mentioned and described, and being all of full age and competent to contract, entered into a contract whereby they agreed to choose each a disinterested person to make partition of said lands between them, and in pursuance of said contract the said J. D. chose F. F., the said L. D. chose N. H., and this defendant chose W. W., who were all disinterested parties, to make said partition; that thereupon the aforesaid parties so chosen made partition of said lands between the said J. D., L. D., and this defendant, and assigned and set off to the said J. D. the following portion of said lands, to-wit: [*describing the portion set off to J. D.*], and assigned and set off to L. D. the following portion of said land, to-wit: [*describing the portion set off to L. D.*], and assigned and set off to this defendant the balance of said

[33] See 1 Enc. Forms, 880, 881.

land, and the aforesaid plaintiffs and this defendant procured the county surveyor to survey and establish the lines of the land so set off to each; that in pursuance of the said contract and partition so made under it as aforesaid, each of the above-named parties, plaintiffs and defendant, entered into and took possession of the land respectively set off and assigned to them, and procured the same to be transferred to them respectively, upon the land books of the county of ———, and duly entered for taxation, and have held possession solely and uninterruptedly of the said real estate so assigned to them from that day to the present time.

Defendant has made lasting and valuable improvements on the land as assigned to him and has expended in ditching said land the sum of ——— dollars, and has built fences upon said land to the value of ——— dollars, and has otherwise improved the same and placed it in a high state of cultivation.

Wherefore this defendant having fully answered said bill prays to be hence dismissed with his reasonable costs and as in duty bound he will ever pray, etc.

C. D.,
By Counsel.[34]

J. M.,
Solicitor for the Defendant.

[34] The form above given appears substantially in Moore v. Kerr, 46 Ind. 468.

CHAPTER XLVI

THE REPLICATION

§ 1116. The general replication.
§ 1117. The plaintiff's special reply in writing to the answer of defendant setting up claim to affirmative relief.
§ 1118. The special reply of a defendant to the answer of his codefendant, wherein affirmative relief is sought by the latter against the former.

No. 256.

§ 1116. The general replication.

State of ———,
County of ———, ss:
In the Circuit Court of said County.

A——— B———
v. } In Chancery.
C——— D———

The replication of A. B., complainant, to the answer of C. D., defendant.

This repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that he will aver and prove his said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied to by this repliant. Without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law, to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver and prove, as this honor-

able court shall direct, and humbly prays as in and by his said bill he hath already prayed.* A. B.,

J. M., By Counsel.[1]

Solicitor for the Plaintiff.

No. 257.

§ 1117. The plaintiff's special reply in writing to the answer of defendant setting up claim to affirmative relief.

[*As in No. 256 to the * and then continue as follows:*]

And now this plaintiff by way of special reply to the answer of the defendant filed in this cause, wherein the said defendant prays for affirmative relief against this plaintiff, says that [*insert here a denial of such parts of said answer as are not admitted to be true, and stating any facts constituting a defense to the defendant's claim for affirmative relief*]. And now having fully specially replied to the said defendant's claim for affirmative relief, as made in said answer, the plaintiff prays hence to be dismissed as to so much of said answer as sets up any claim for affirmative relief against this plaintiff.

J. H. M., A. B.,

Solicitor for the Plaintiff. By Counsel.[2]

No. 258.

§ 1118. The special reply of a defendant to the answer of his codefendant, wherein affirmative relief is sought by the latter against the former.

[*After giving the caption as indicated in No. 256 to the °, continue as follows:*]

And the defendant, C. D., by way of special reply to the answer of his codefendant, E. F., filed in this cause, wherein

[1] The foregoing form is taken from Sands, Suit in Equity, 391.

[2] The above form of a special reply in writing is only intended for use in West Virginia, and is constructed from the provisions of the statute in that state. As to the cases wherein such a reply is required, see *ante*, § 478.

the said defendant, E. F., prays for affirmative relief against this defendant, says that [*insert here a denial of such parts of said answer as are not admitted to be true and stating any facts considered a defense to the defendant's claim for affirmative relief*]. And now, this defendant having fully specially replied to the claim of his codefendant, E. F., for affirmative relief as made in his said answer, this defendant, C. D., prays to be hence dismissed as to so much of said answer as sets up any claim for affirmative relief against this defendant, C. D.

J. C. W., C. D.,
Solicitor for the Defendant. By Counsel.[3]

[3] See note to No. 257.

CHAPTER XLVII

AFFIDAVITS

§ 1119. To any pleading in West Virginia made by a party suing in his own right.
§ 1120. To any pleading by an administrator or other fiduciary in West Virginia.
§ 1121. To a bill of, or answer to, an injunction in West Virginia, when verified by a person other than the plaintiff.
§ 1122. To a bill in chancery in Virginia.
§ 1123. To a bill for an injunction in Virginia.
§ 1124. To a bill by a fiduciary in Virginia.
§ 1125. To an answer in Virginia.
§ 1126. To a bill of interpleader.
§ 1127. For an attachment in West Virginia.
§ 1128. To a bill on a lost instrument.
§ 1129. To a bill of review on discovery of new matter.
§ 1130. For an attachment in Virginia for specific personal property.
§ 1131. For an attachment in a suit in Virginia to recover a debt or damages for the breach of a contract.
§ 1132. For a continuance.
§ 1133. Of nonresidence of witness, that his deposition may be taken.
§ 1134. Of nonresidence of defendant for the purpose of an order of publication.
§ 1135. To be taken and subscribed by commissioners appointed to make partition.
§ 1136. By poor person to relieve from giving security for costs.
§ 1137. Of default to file an answer with a view to compel the filing thereof.
§ 1138. To the service of process or notice by a private person.
§ 1139. Affidavit for proof of debt before a commissioner.
§ 1140. Counter-affidavit denying debt before a commissioner.
§ 1141. Affidavit to be delivered to divorce commissioner to the effect that plaintiff does not know the post office address of defendant.

No. 259.

§ 1119. To any pleading in West Virginia made by a party suing in his own right.

State of West Virginia,

——— County, to-wit:

A——— B———, the plaintiff [*or* defendant, *as the case may be*] named in the foregoing bill [*or answer, replication or*

plea, as the case may be], being duly sworn,* says that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and that so far as they are therein stated to be upon information, he believes them to be true.

A. B.,
Plaintiff or Defendant.

° Taken, sworn to and subscribed before me this ——— day of ———.

C——— D———,
Clerk [*or other officer swearing him*].[1]

No. 260.

§ 1120. To any pleading by an administrator or other fiduciary in West Virginia.

[*After the usual caption and identification to the * as indicated in No. 259, proceed as follows:*] says, that he believes the facts and allegations therein contained to be true.

A——— B———, Administrator of C. D., deceased [*or in whatever character the fiduciary may be acting*].

[*Append the usual jurat, as in No. 259, from the °.*]

[1] The foregoing affidavit is in the form prescribed by statute in West Virginia, Code, c. 125, § 42, and must be appended to the bill or other pleading to be verified.

In any case where an affidavit is taken before a notary public, he should state when his commission will expire. W. Va. Code, 1913, c. 51, § 16.

In West Virginia, if the oath be administered within the state, the certificate of the notary may be merely under the notary's signature, and it is not necessary to affix his official seal. W. Va. Code, 1913, c. 51, §§ 3, 5. But an affidavit taken before an officer of another state or country must be certified under his official seal, as well as under his signature. If the officer administering the oath in such case should have no official seal, then the genuineness of his signature and his authority to administer the oath must be authenticated by some other officer of the same state or country under the official seal of the latter. W. Va. Code, 1918, c. 130, § 31; Acts 1917, c. 48.

As to the authentication of foreign affidavits in Virginia, see Va. Code, 1904, § 174.

No. 261.

§ 1121. To a bill of, or answer to, an injunction in West Virginia, when verified by a person other than the plaintiff.

State of West Virginia,

County of ———, to-wit:

C. D., being duly sworn, says that he is the agent [*or* attorney, *etc., as the case may be*] of the plaintiff named in the foregoing bill [*or of the defendant named in the foregoing answer*], and that he knows the contents thereof; that the facts and allegations therein contained are true, except such as are therein stated upon information and belief, and that as to such allegations he believes them to be true.

C——— D———,

Agent [*or* attorney, *as the case may be*].[2]

[*Append the jurat, as in No. 259, from the* °.]

No. 262.

§ 1122. To a bill in chancery in Virginia.

State of Virginia,

County of ———, set:

I, ——— ———, a justice of the peace for the county and state aforesaid, hereby certify that ——— ——— personally appeared before me, in my county aforesaid, and made oath * that the allegations contained in the foregoing bill, which he makes of his own knowledge, are true, and that all other matters therein stated he believes to be true.

† Given under my hand this ——— day of ———, 19—.

——— ———, J. P.[3]

[2] The foregoing form is the one prescribed by statute in West Virginia, Code, c. 125, § 42.

[3] The foregoing form is taken from 2 Bart., Ch. Pr. (2nd Ed.), 1299. See *ante*, § 437.

No. 263.

§ 1123. To a bill for an injunction in Virginia.

[*As in No. 262 to the * and then as follows:*] that the allegations contained in the foregoing bill are made upon his own knowledge and that such allegations are true.

[*Append the jurat, as in No. 262, from the* †.]

No. 264.

§ 1124. To a bill by a fiduciary in Virginia.

State of ———,

County of ———, set:

This day personally appeared before me, the undersigned, a justice of the peace for the county aforesaid, the above-named A. B., guardian of C. D., plaintiff in the foregoing bill, and made oath that he believes the statements therein contained to be true.

Given under my hand this ——— day of ———, 19—.

——— ———, J. P.[4]

No. 265.

§ 1125. To an answer in Virginia.

State of Virginia,

County of ———, set:

This day personally appeared before me H. R., a justice of the peace [*notary public or commissioner in chancery for the circuit court of the ——— of ———, Va.*], for the county [*or* corporation] and state aforesaid, D. D. [*or* D. D., E. F., *etc., including all the respondents*], whose answer is above written, and made oath that the statements contained in the said answer, so far as made of his [*or* their] own knowledge are true;

[4] The foregoing form is taken from 2 Bart., Ch. Pr. (2nd Ed.), 1272.

and so far as made from knowledge, or information derived from others, they are believed to be true.

Given under my hand this ——— day of ———, 19—.

———, J. P.[5]

No. 266.

§ 1126. To a bill of interpleader.

[*After the usual caption as indicated in No. 259 or 262, proceed as follows after the * in No. 259:*] says that he hath not exhibited his bill at th[illegible] or any or

s\
age[illegible] D———) that
J——— as instituted [*or* is about
suit in equity against R——— R——— for the r
claim [*or* debt] arising out of contract [*or* to recover damage

[5] The above form is taken from 2 Bart., Ch. Pr. (2nd Ed.), 1301.

[6] The foregoing form appears substantially in 4 Desty, Fed. Proc., 495, from which it is taken.

for a wrong] in the circuit court of the county of ———, and state of West Virginia; that the nature of his [*or* the said J——— D———'s] claim is [*here set out the nature of the claim*]; that affiant believes that he [*or* the said J——— D———] is justly entitled to recover in said suit, at the least, the amount of ——— dollars; and affiant believes that [*here set out the existence of the ground or grounds for the attachment*].

Affiant further states that the following are the material facts relied upon by him to show the existence of the ground [*or* grounds, *as the case may be*] upon which this application for an attachment is based: [*Here set out specifically the facts relied on to show the existence of the ground or grounds for an attachment.*] (Signed) J——— D———.[7]

[*Append the jurat as in No. 259.*]

No. 268.

§ 1128. To a bill on a lost instrument.

[*After the usual caption and commencement:*] that on the ——— day of ———, 19—, the defendant, C——— D———, made and delivered to the plaintiff, A——— B———, his promissory note, payable to said A——— B———, ——— after date, for the sum of ——— dollars, as more fully set forth and alleged in the foregoing bill; that the said A——— B——— is now the owner and holder of said note; that the same has not been paid or otherwise discharged; but that the said note, on or about the ——— day of ———, 19—, was lost or destroyed, as set forth in the foregoing bill.

(Signed) A——— B———.[8]

[*Append the usual jurat.*]

[7] Based upon the requirements of the statute as shown in this treatise, *ante*, §§ 795, 796.

[8] When a bill is filed to obtain the benefit of an instrument properly belonging to the jurisdiction of a court of law upon the ground that it is lost, an affidavit of the loss of the instrument is required. The requisition of the affidavit is a caution required by the chancery court in permitting a transfer of

No. 269.

§ 1129. To a bill of review on discovery of new matter.

State of ———,

County of ———, to-wit:

A——— B———, the complainant in the foregoing bill of complaint, on oath says that he has heard the same read and understands the contents thereof; that the matters set forth therein as new matters are true in substance and in fact; that they were first discovered by this affiant since the rendition of the decree in the foregoing bill mentioned, to-wit, about the time they are therein stated to have been discovered; and that the same could not possibly be had, known or used, at the time when said cause was heard or the decree therein rendered.

A——— B———, Plaintiff.[9]

[*Append the usual jurat.*]

No. 270.

§ 1130. For an attachment in Virginia for specific personal property.

State of Virginia,

County of ———, to-wit:

This day A. B. [*or* E. F.],[10] being first duly sworn according to law, made oath before me, C. C., clerk of the ———

jurisdiction from the court of common law to a court of equity. Hooe v. Harrison, 11 Ala. 499; O'Bannon v. Myers, 36 Ala. 551, 76 Am. Dec. 335; Pennington v. Governor, 1 Blackf. (Ind.) 78; Grant v. Reid, 1 Jones L. (46 N. C.) 512; Lyttle v. Cozad, 21 W. Va. 183. And an affidavit of loss is necessary in an action on a lost deed, where relief as well as discovery is sought. Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 294.

In Hickman v. Painter, 11 W. Va. 386, which was a suit on a lost instrument, to the bill in that case the jurat of the clerk was thus appended: "Sworn to in open court by the plaintiff." *Held:*

"That as the plaintiff swore to the bill in open court, and as the bill specificaly alleges the loss of the receipt, the oath, thus taken or made, is sufficient to answer the requirement of the law as to a lost instrument."

[9] The foregoing form is taken from Puterbaugh, Ch. Pl. & Pr., (3rd Ed.), 320, and is the one now generally used in a court of equity for the verification of a bill of review for newly-discovered evidence. See *ante*, § 233.

[10] An affidavit under the Virginia Code of 1873, c. 148, § 2, where an

court of said county [*or* corporation] of A———, and says (that he is the agent or attorney of A. B.) that he [*or* the said A. B.] is [*or* is to be] the plaintiff in a suit in equity * which has been [*or* is about to be] instituted in the circuit [*or* corporation] court of the county [*or* corporation] of A———, against C. D.; that the nature of the personal property to be recovered in said suit is [*here state the nature of the property*], and that according to affiant's belief [11] the value of such prop-

attachment was issued in a pending suit, need not describe the affiant as the plaintiff, or as the plaintiff's agent or attorney. Benn v. Hatcher, 81 Va. 25.

But under the present statute, the requirements are more strict.

"An attachment awarded to a corporation as plaintiff, based upon the affidavit of its secretary and treasurer, as such and without more, can not be maintained. The court can not say, as a matter of law and in the absence of averment, that the term 'secretary and treasurer' necessarily imports the relation of agency between such officer and his corporation within the intendment of the attachment laws of this state, which require the affidavit to be made by 'the plaintiff, his agent or attorney.' If he is in fact such agent, it should be so averred in the affidavit. Attachment laws being in derogation of the common law, and harsh in their application, substantial compliance with their requirements must be made to appear on the face of the proceedings." Taylor v. Sutherlin-Meade Tobacco Co., 107 Va. 787, 60 S. E. 132, 14 L. R. A. (N.S.) 1135. Likewise, where the affidavit is "signed by the affiant with the addition of the words 'Vice-President' or 'Director.'" Damron and Kelly v. Citizens' Nat. Bank, 112 Va. 544, 72 S. E. 153.

Under § 14, c. 123, 1 Rev. Code Va., it was held that one member of a mercantile house, to which a debt has been contracted but had not fallen due, was competent to make the complaint on oath. Kyle v. Connelly, 3 Leigh. (Va.) 719.

[11] Every averment in an affidavit under the Code of 1873, c. 148, § 1, should have been stated as a fact absolutely upon affiant's own information, and not upon belief, or information and belief. For this reason an affidavit in these words, "Personally appeared before me, J. B. Burgess, Clerk of the Circuit Court of Frederick County, Virginia, A. R. Pendleton, attorney-in-fact for S. C. Clowser, who made oath that J. W. C. Hall is, as he believes, justly indebted to the said S. C. Clowser in the sum of five thousand dollars; that there is present cause for action therefor; that said J. W. C. Hall is not a resident of this state, and that affiant believes he has estate within said County of Frederick, Virginia," was held insufficient. Clowser v. Hall, 80 Va. 864.

Under the present statute of Virginia the affiant's belief as to the value of the property and the probable amount of damages that the

erty is the sum of ——— dollars,[12] and that the probable amount of damages plaintiff will recover for the detention thereof is the sum of ———[13] dollars; that plaintiff's said claim is believed to be just,[14] and that to the best of affiant's belief [*here set out one or more of the grounds of attachment*].[15]

Given under my hand this ——— day of ———, in the year of our Lord 19—. C. C., Clerk.

No. 271.

§ 1131. For an attachment in a suit in Virginia to recover a debt or damages for the breach of a contract.

[*As in No. 270 down to the* *:] for the recovery of a debt [*or* damages for a breach of contract] which has been instituted, or is about to be instituted, in the circuit [*or* corporation] court of the county [*or* corporation] of A———; that the amount of said plaintiff's claim in said suit is the sum of ——— dollars, together with interest from the ——— day of ———, 19—, until paid, which said sum and amount, at the least, the affiant believes the plaintiff is entitled to, and ought to recover in said suit; that said plaintiff's claim is believed to be just, and that to the best of affiant's belief [*here set out one or more of the grounds for attachment*].[16]

[*Append the usual jurat.*]

plaintiff ought to recover, etc., and as to the existence of the grounds of the attachment, is all that is required. Va. Code, 1904, § 2959.

[12] See *ante*, § 795.

[13] See *ante*, § 795.

[14] For jurisdiction of circuit courts as depending upon amount in controversy, see Va. Code, 1904, § 3058.

For the jurisdiction of corporation courts as depending upon amount in controversy, see Va. Code, 1904, § 3055.

[15] The grounds for an attachment and the circumstances under which it may issue are enumerated in Va. Code, 1904, § 2959.

[16] This form is constructed from the requirements of the statute of Virginia, in such case made and provided. See *ante*, § 795.

No. 272.

§ 1132. For a continuance.

State of ———,
County of ———, to-wit:

A——— B———
v. } In Chancery.
C——— D———.

Pending in the Circuit Court of the County and State aforesaid.

Before the undersigned authority this day personally appeared A——— B———, who, being by me first duly sworn, says * that he is the plaintiff in the above entitled cause; that he has taken his testimony in support of his said bill, and completed the taking thereof on the ——— day of ———, 19—; that thereupon the defendant waited for some time before giving notice to take any evidence; that the said defendant did not complete the taking of his evidence in the said cause until the ——— day of ———, 19—; that the affiant has the following witnesses: [*here name such witnesses*], whose testimony is important and material to this plaintiff in said cause; that the nature of such testimony is as follows: [*state concisely the facts to be proved so as to show their relevancy, etc.*]; that he can not prove the same facts by any other witness or witnesses that he can prove by the said witnesses above named; that he can not safely submit his cause for hearing and decision in the absence of the evidence of the said witnesses; that the evidence of the said defendant taken and completed as above stated has made the testimony of said witnesses important and material to this plaintiff by way of rebuttal and contradiction to the testimony of certain witnesses examined by the said defendant; that upon the completion of the taking of the evidence of the said defendant there was not sufficient time until the convening of this court to enable the said plaintiff to take his said rebuttal and contradictory evidence.

The plaintiff therefore makes this affidavit for a continuance of said cause to enable him to take the testimony of the wit-

nesses above named; and he says that the above witnesses and each of them reside in the county of ——— and state of ———, and that affiant can procure their evidence between now and the next term of this court, if his said case be continued, thereby giving him an opportunity so to do. Affiant further says that this application is not made for delay, but for the furtherance of justice.

A——— B———, Plaintiff.

[*Append the usual jurat.*]

No. 273.

§ 1133. Of nonresidence of witness, that his deposition may be taken.

State of ———,
County of ———, to-wit:

A——— B———
v. } In Chancery.
C——— D———.

Pending in the Circuit Court of the County and State aforesaid.

A——— B———, being by me first duly sworn, says that he is the plaintiff in the above styled action;* that he desires to take the deposition of E——— F———, who is a nonresident of the state aforesaid, now residing at ———, in the county of ———, and state of ———.

(Signed) A——— B———.[17]

[*Append the usual jurat.*]

[17] The depositions of nonresident witnesses, taken without the affidavit required by section 34 of chapter 130 of the Code, can be read upon the trial, if it appears from the depositions themselves that the witnesses were nonresidents of the state at the time their depositions were taken. Hoopes v. Devaughn, 43 W. Va. 447, 27 S. E. 251.

No. 273*a*.

§ 1134. Of nonresidence of defendant for the purpose of an order of publication.

[*As in No. 272 or 273 to the * and then continue as follows:*] that the said defendant, C——— D———, is a nonresident of the state of West Virginia. A——— B———.[18]

[*Append the usual jurat.*]

No. 274.

§ 1135. To be taken and subscribed by commissioners appointed to make partition.

State of ———,
County of ———, to-wit:

A——— B———
v. } In Chancery.
C——— D———.

Pending in the Circuit Court of the County and State aforesaid.

We, the undersigned commissioners, duly appointed to make partition in the above entitled cause, of the real estate in the bill and proceedings in said cause mentioned and described, do solemnly swear that we will fairly and impartially make partition of the said premises, according to the rights and interests of the parties, as declared by the decree appointing us as such commissioners, if the same can be done consistently with the interests of the parties; and we will true report thereof make to the court.

[18] In Fayette Land Co. v. Louisville & N. R. Co., 93 Va. 274, 24 S. E. 1016, the supreme court of appeals of Virginia decides that, under the provisions of the Code of that state, section 3230, where the bill states that there are or may be persons interested in the subject to be disposed of whose names are unknown, and makes such persons parties by the general description of "parties unknown," on affidavit of the fact that said parties are unknown, an order of publication may be entered against such unknown parties, an affidavit by the local attorney of a corporation complainant, reciting that the parties are unknown to affiant, is sufficient.

But if the said premises are not susceptible of partition, we will likewise make true report thereof.

_____,
_____,
_____.

[*Append the usual jurat.*]

No. 275.

§ 1136. By poor person to relieve from giving security for costs.

State of ———,
County of ———, to-wit:

A——— B———
v. } In Chancery.
C——— D———.

Pending in the Circuit Court of the County and State aforesaid.

Before the undersigned authority this day personally came A——— B———, who, after being duly sworn, says that he is the plaintiff in the above styled suit, and a nonresident of the state of ———; that his nonresidence has been suggested of record and security for costs demanded.

This affiant further says that he is a poor person and has no property, real or personal, with which to pay counsel or fees of the officers of the court, and is wholly unable to give any security for the payment of costs in the above entitled cause.

This affiant therefore asks that he may be relieved from giving security for costs, and that he may be permitted to prosecute his suit in the said court as a poor person.

A——— B———, Plaintiff.

[*Append the usual jurat.*]

No. 276.

§ 1137. Of default to file an answer with a view to compel the filing thereof.

State of ———,
County of ———, ss:

A——— B———
v. } In Chancery.
C——— D———

Pending in the Circuit Court of the State and County aforesaid.

J. M., solicitor for the plaintiff in the above styled suit, being duly sworn, says that the defendant therein has failed to file any answer in this cause to the interrogatories propounded to him in the plaintiff's bill in this cause filed; that a full and direct answer of the said interrogatories and each one thereof is necessary to enable the plaintiff to sustain his bill.

This affiant therefore asks that a rule be awarded returnable in a reasonable time and served on the defendant, requiring him to show cause, if any he can, why he should not answer the plaintiff's bill, and said interrogatories therein propounded.

J. M.

[*Append the usual jurat.*]

No. 277.

§ 1138. To the service of process or notice by a private person.

State of ———,
County of ———, ss:

F. G., being duly sworn, says that he executed the within summons [*or* notice] upon the within named C. D., by delivering to him a copy thereof in the county of ———, in the state of ———, on the ——— day of ———, 19—. F. G.

[*Append the usual jurat.*]

No. 277*a*.

§ 1139. Affidavit for proof of debt before a commissioner.

State of West Virginia,

County of ———, ss:

This day personally appeared before the undersigned authority A——— B——— [*or* S——— T———], who, being by me first duly sworn, on his oath says that C——— D———, defendant in the chancery cause of A——— B——— v. C——— D——— and others, pending in the circuit court of ——— county, West Virginia, is justly indebted to the said A——— B——— in the sum of $———, money due on contract, for goods, wares and merchandise sold and delivered by the said A——— B——— to the said C——— D——— at the instance and request of the said C——— D——— [*or state any other liability, as the case may be, showing a debt due on an express or implied contract*], as more particularly appears from the itemized account hereto attached, which account affiant says is true and correct in each and every particular, and for which various items therein stated the said C——— D——— promised to pay to the said A——— B——— the divers sums in the said account itemized; that the said sum of $——— has not been paid, nor has any part thereof been paid, by the said C——— D———, nor by any person or persons for him, to the said A——— B———, nor to any person or persons for the said A——— B———, but that the whole of the said sum of $——— is now justly due and owing to the said A——— B——— and is subject to no credits nor set-offs.

[*If the debt or demand be against a deceased debtor or his estate, in which event the affidavit must be made by a person who is not interested in the adjudication of the claim—e. g., by S——— T———, add the following paragraph:*]

Affiant further says that [*here concisely state facts showing that affiant has competent knowledge of the facts which he has already sworn to*]; that the said A——— B——— does not and did not derive any interest or title in or to the said debt and claim by assignment or otherwise, either directly or re-

motely, from, through or under said affiant; and that the said affiant does not have nor claim any interest or title whatever in or to the said debt or claim, by assignment or otherwise, either directly or remotely, from, through or under the said A——— B——— or any other person.

A——— B———,
[*or* S——— T———].[19]

[*Add the proper jurat as in preceding forms.*]

No. 277*b*.

§ 1140. Counter-affidavit denying debt before a commissioner.

State of West Virginia,
County of ———, ss:

This day personally appeared before the undersigned authority C——— D———, who, being by me first duly sworn, on his oath says: that he is a defendant in the chancery cause of A——— B——— v. C——— D——— and others, pending the circuit court of ——— county, West Virginia; that the said A——— B——— [*or* that H——— S———] has filed before R——— M———, a commissioner in chancery before whom said cause is now pending, a statement of account and affidavit whereby he asserts against affiant a certain claim and debt for the sum of $———; that affiant denies the correctness of said account and affidavit and each and every part thereof; that each and every statement made in said affidavit is incorrect and untrue; that the said sum stated in said account and in said affidavit is not due and owing, nor is any part thereof due and owing, in any manner from affiant to the said A——— B———, as he states in his said statement of account and affidavit. C——— D———.[20]

[*Add the proper jurat as in preceding forms.*]

[19] This form is based on the West Virginia statute, as amended by Acts of 1915. See W. Va. Code, 1916, c. 129, § 11; Acts 1915, c. 74.

[20] This form is based on the same statute referred to in the preceding note.

No. 277*c*.

§ 1141. Affidavit to be delivered to divorce commissioner to the effect that plaintiff does not know the post-office address of defendant.

J——— M———, Plaintiff,

v.

L——— M———, Defendant.

Pending in the Circuit Court of ——— County, West Virginia.

State of West Virginia,

County of ———, ss:

This day personally appeared before the undersigned authority, J——— M———, the plaintiff in the above styled cause, and after being by me duly sworn upon his oath says that he does not know the post-office address of the said defendant.

J——— M———.[21]

[*Add the proper jurat as in previous forms.*]

[21] This form is based upon the requirements of the West Virginia statute, as amended by Acts of 1915. W. Va. Code, 1916, c. 64, § 17; Acts 1915, c. 73. The affidavit should be delivered to the divorce commissioner at the same time when the notice provided for by the same section of the statute is served. Since the statute requires lack of knowledge of the defendant's address at the time of service of the notice, the affidavit should bear date on the day when the notice was served.

CHAPTER XLVIII

NOTICES

§ 1142. To hear petition of guardian to sell property of his minor ward.
§ 1143. To hear petition to release inchoate right of dower of insane wife.
§ 1144. To take depositions.
§ 1145. Of application for an injunction.
§ 1146. Of application for the appointment of a receiver.—General form.
§ 1147. Of application for the appointment of a receiver in a suit to foreclose a mortgage.
§ 1148. Of application for the appointment of a receiver in a partnership suit.
§ 1149. By trustee for sale of property under a deed of trust in West Virginia.
§ 1150. Of sale of infant's lands in suit by guardian.
§ 1151. Of sale of property by trustee in a deed of trust in Virginia.
§ 1152. For the appointment of a new trustee in a deed of trust.
§ 1153. In a proceeding to transfer property out of the state belonging to persons under disability.
§ 1154. Notice to creditors in a suit to subject the real estate of a decedent to the payment of his debts.
§ 1155. To lienholders in a suit to enforce judgment liens.
§ 1156. Of sale of real estate to be made by a special commissioner.
§ 1157. Of motion to dissolve an injunction.
§ 1158. Of application for a rehearing of a decree entered by default.
§ 1159. That a commissioner's report has been completed.
§ 1160. To correct decree wherein there is clerical error.
§ 1161. Of taking an account by a commissioner in chancery.
§ 1162. To divorce commissioner of hearing of cause.

No. 278.

§ 1142. To hear petition of guardian to sell property of his minor ward.

To C——— D———, and all other persons whom it may concern:

Notice is hereby given that the undersigned, A——— B———, guardian of C——— D———, a minor, will make application to the circuit court of ——— county, in the state

of West Virginia, at a regular term thereof to be held at the court house in the town of ———, in the said county, on the ——— day of ———, 19—, for an order of said court, authorizing him as guardian to sell the following real estate belonging to the said minor, situate in the district of ——— and county and state aforesaid: [*Here briefly describe the property.*]

A——— B———,
Guardian of C——— D———,
By Counsel.

G——— E——— H———,
Solicitor for A——— B———.

No. 279.

§ 1143. To hear petition to release inchoate right of dower of insane wife.

To ———, wife of C. D.:

You are hereby notified that the undersigned, your husband, will make application on the ——— day of ———, 19—, to the circuit court of the county of ——— and state of ———, to institute proceedings to have your inchoate right of dower in and to the following described premises released: [*Here describe the land.*]

You are further hereby notified that I have contracted for the sale of said land to ———, for the sum of $———, and that my interests will be promoted by such sale.

J. D.,
By Counsel.[1]

No. 280.

§ 1144. To take depositions.

To R. M. and N. O.:

Take notice that on the ——— day of ———, 19—, at the office of J. O. S., in the town of R———, in the county of

[1] This form is intended for use under the statutes of the Virginias, W. Va. Code, c. 83, § 10, and Va. Code, 1904, § 2625, and is based upon the case of Hess v. Gale, 93 Va. 467, 25 S. E. 533.

M——— and state of ———, between the hours of 9 o'clock A. M. and 6 o'clock P. M. of that day, I shall proceed to take the depositions of X. X. and L. L. and others, to be read in evidence in my behalf in a certain suit in equity pending in the ——— court of ——— county and state of ———, in which I am plaintiff and you are defendants; and, if from any cause the taking of said depositions be not commenced on that day, or, if commenced, if they be not completed on that day, the taking of the said depositions will be adjourned from day to day, at the same place and between the same hours, until they are completed. A——— B———,

J——— L———, Solicitor. By Counsel.[2]

No. 281.

§ 1145. Of application for an injunction.

To C——— D———:

You are hereby notified that the undersigned will, on the ——— day of ———, 19—, at ——— o'clock A. M., at ———, in the county of ——— and state of ———, make application to the judge of the circuit court of said county for an injunction and restraining order, to enjoin you, your agents, servants and employes from [*state what acts are sought to be enjoined*], until the further order of the court; when and where you can appear if you see proper. A——— B———,

J——— H——— S———, By Counsel.

Solicitor.

No. 282.

§ 1146. Of application for the appointment of a receiver—General form.

To E——— W———, A——— A——— S———, D——— S———, S——— A——— M——— and A——— S———:

Your are hereby notified that on the ——— day of ———,

[2] The foregoing form will be found in Sands, Suit in Equity (2nd Ed.), pp. 488, 489; 2 Bart., Ch. Pr. (2nd Ed.), 1319.

19—, the plaintiffs in the chancery cause of B——— W——— and others, now pending in the circuit court of H——— county, state of ———, will make a motion in the circuit court of said county of H———, in said chancery cause, to have a special receiver appointed therein as provided in section 28 of chapter 133 of the Code, to take possession and control of the one hundred and twenty-five acres of land mentioned and described in the bill filed in said cause, and wherein they are plaintiffs and you are defendants.

B——— W——— and others, Plaintiffs,
By Counsel.[3]

J——— W———,
Solicitor.

No. 283.

§ 1147. Of application for the appointment of a receiver in a suit to foreclose a mortgage.

State of ———,
County of ———, to-wit:

D——— F———
v.
D——— W——— F———. } In Chancery.

Pending in the Circuit Court of said County.

The defendant in the above entitled cause will take notice that an application will be made on the ——— day of the March term, 19—, of the circuit court of said county, at ——— o'clock A. M., or as soon thereafter as counsel may be heard, for the appointment of a receiver, to take possession of the mortgaged premises mentioned and described in the above cause, rent the same, and receive the rents, issues and profits thereof, and hold the same subject to the further order or decree of the

[3] The above form is taken from Wilson v. Maddox, 46 W. Va. 641, 33 S. E. 775.

said court in this cause, with all the power and authority, and subject to all the responsibilities of receivers.

Yours respectfully,
D——— F———,
By Counsel.

Dated, ——— day of ———, 19—.
J——— U——— V———, Solicitor.[4]

No. 284.

§ 1148. Of application for the appointment of a receiver in a partnership suit.

[*After giving title of the cause and court wherein pending, as in No. 283, proceed as follows:*]

Please take notice that a motion will be made by the undersigned before the judge of the said court, in vacation, at his chambers, in the town of ———, in the county of ———, and state of ———, on Monday, the ——— day of ———, 19—, or as soon thereafter as counsel can be heard, for an order for the appointment of a receiver of all the personal partnership property of the firm of R. R. & Company, with the usual powers of and directions of receivers.

Dated this ——— day of ———, 19—.
A. B.,
By Counsel.
J. C., Solicitor.[5]

No. 285.

§ 1149. By trustee for sale of property under a deed of trust in West Virginia.

NOTICE OF TRUSTEE'S SALE.

By virtue of the authority vested in me by a deed of trust bearing date on the ——— day of ———, 19—, executed by A. B. to the undersigned E. F., as trustee, to secure to C. D. the payment of a certain note therein described, recorded in

[4] See 15 Enc. Forms, pp. 648, 649.
[5] See Booth v. Smith, 79 Hun (N. Y.) 384, 29 N. Y. S. 790, 61 N. Y. St. Rep. 496.

the office of the clerk of the county court of ——— county and state of West Virginia, in Trust Deed Book No. ———, at page ———, the said note now being due and payable, and default having been made in the payment thereof, the undersigned, having been required so to do by the said C. D., will offer for sale at public auction to the highest bidder at [*here insert the place of sale*] on the ——— day of ———, 19—, at ——— o'clock A. M. [*or,* P. M., *as the case may be*], the following described real estate: [*Here describe the property, giving the quantity.*]

Said sale will be made upon the following terms: [*Here describe the terms of sale.*] E. F., Trustee.[6]

No. 286.

§ 1150. Of sale of infant's lands in suit by guardian.

COMMISSIONER'S NOTICE OF SALE.

In pursuance of a decree in P's Guardian v. P. *et al.* made by the circuit court of Hanover county on the ——— day of ———, 19—, I shall, as commissioner appointed thereby, proceed to sell at public auction on the premises [*or,* at the front door of the court house of H. county] on the ——— day of ———, 19—, the tract of land containing 643 acres of which Mrs. P. lately died seized. The land lies on the ——— road, distant about ——— miles from the court house. It is very valuable. It will be sold in one or more parcels to suit purchasers. Terms of sale: one-third cash, balance at one, two and three years from day of sale, with interest from day of sale, for credit installments, bonds to be given by the purchaser or purchasers, and the title retained until full purchase money is paid and conveyance directed by the court.

WILLIAM W., Comm'r.[7]

[6] The foregoing form is constructed from the provisions of the Code of West Virginia, c. 72, § 6.

[7] The above form is taken from Sands, Suit in Equity (2nd Ed.), 555.

No. 287.

§ 1151. Of sale of property by trustee in a deed of trust in Virginia.

TRUSTEE'S SALE NOTICE.

By virtue of a deed of trust executed by A——— B——— to C——— D——— as trustee, bearing date on the ——— day of ———, 19—, recorded in the office of the clerk of the county court of ——— county, Virginia, in Trust Deed Book No. ———, page ———, given to secure the payment of a certain note in said trust deed described, payable to one E——— F———, the undersigned trustee, being required so to do by the said E——— F———, the creditor secured by said trust deed, and said note now being due and payable, and default having been made in the payment thereof, will offer for sale at public auction, for cash, to the highest bidder, at the front door of the court house of ——— county, in said state, on the ——— day of ———, 19—, at ——— o'clock of that day, the following described property conveyed by said trust deed: [*Here describe property.*] C. D., Trustee.[8]

No. 288.

§ 1152. For the appointment of a new trustee in a deed of trust.

To A——— B———:

You are hereby notified that on the ——— day of the November term, 19—, of the circuit court of ——— county, West Virginia, at ——— o'clock, or as soon thereafter as counsel may be heard in reference to the matter, the undersigned will move the said court to appoint ———, of the county and state aforesaid, to act as trustee in the place and stead of C——— D———, the person named as trustee in a certain deed of trust, bearing date on the ——— day of ———, 19—, and

[8] The above form is constructed from the statute of Virginia, Va. Code, 1904, § 2442.

duly of record in the said county of ——— and state aforesaid, in Trust Deed Book No. ———, page ———, the said C——— D——— having departed this life [*or whatever ground may exist for the appointment of a new trustee*]; which deed of trust was given to secure the payment of a certain note therein described, executed to the undersigned by you, and which note is now due and unpaid.

E——— F———,
Dated, ——— day of ———, 19—. By Counsel.
J——— F——— C———, Solicitor.[9]

No. 289.

§ 1153. In a proceeding to transfer property out of the state belonging to persons under disability.

To Whom it May Concern:

Notice is hereby given that I, A——— B———, guardian of C——— D———, residents of the county of ——— and state of Ohio, where the said A——— B——— was duly appointed as guardian of said C——— D———, will make application to the circuit court of ——— county, West Virginia, on the ——— day of ———, 19—, for the entry of an order authorizing me, as guardian aforesaid, to transfer from the said state of West Virginia to the said state of Ohio the proceeds of the sale of certain real estate formerly belonging to the said C——— D———, and located in the said county of ——— and state of West Virginia, now invested in certain securities under the order of said court, and now held by E——— F———, the guardian of said C——— D———, appointed and qualified as such in said county of ——— and state of West Virginia.

A——— B———, Guardian of C——— D———,
for the County of ——— and State of Ohio,
F——— E——— B———, By Counsel.[10]
Solicitor.

[9] Va. Code, 1904, §§ 3419, 3420; W. Va. Code, 1913, c. 132, § 5.
[10] W. Va. Code, 1913, c. 84, § 5.

No. 290.

§ 1154. Notice to creditors in a suit to subject the real estate of a decedent to the payment of his debts.

NOTICE TO CREDITORS.

To the Creditors of A——— B———, Deceased:

In pursuance of a decree of the ——— court of the county of ———, made in a cause therein pending, to subject the real estate of the said A——— B——— to the payment of his debts, you are required to present your claims against the estate of the said A——— B———, for adjudication to C——— D———, commissioner, at his office in the said county, on or before the ——— day of ———.

Witness E——— F———, clerk of the said court, this ——— day of ———. E——— F———,

Clerk.[11]

No. 291.

§ 1155. To lienholders in a suit to enforce judgment liens.

NOTICE TO LIENHOLDERS.

To all persons holding liens by judgment or otherwise, on the real estate, or any part thereof, of A——— B———:

In pursuance of a decree of the circuit court of ——— county, made in a cause therein pending, to subject the real estate of the said A——— B——— to the satisfaction of the liens thereon, you are hereby required to present all claims held by you and each of you against the said A——— B———, which are liens on his real estate, or any part of it, for adjudication to me, at my office in the county [*or*, city, town or village, *as the case may be*] of ———, on or before the ——— day of ———.

Given under my hand this ——— day of ———.

C——— D———,

Commissioner.[12]

[11] The foregoing is the form prescribed by the statute of West Virginia, Code, c. 86, § 8.

[12] The foregoing is the form prescribed by the Code of West Virginia, c. 139, § 7.

No. 292.

§ 1156. Of sale of real estate to be made by a special commissioner.

NOTICE OF JUDICIAL SALE.

Pursuant to a decree of the circuit court of ——— county, West Virginia, made and entered on the ——— day of ———, 19—, in the chancery cause of J. H. W. v. B. C. W. and others, I will on Saturday, the ——— day of ———, 19—, at the front door of the courthouse of ——— county, West Virginia, at ——— o'clock ——— M. of that day, offer for sale to the highest bidder, the following described real estate: [*here describe the property*].

Terms of sale: [*here set forth the terms of sale*].

E. L. S.,
Special Commissioner.

I, M. C. A., clerk of the circuit court of ——— county, West Virginia, hereby certify that bond with security approved by me as sufficient, and in the penalty provided by said decree, has been given by said special commissioner.

M. C. A.,
Clerk.[13]

No. 293.

§ 1157. Of motion to dissolve an injunction.

State of ———,
County of ———, to-wit:

A——— B———
v.
C——— D———. } In Chancery.

Pending in the circuit court of said county and state.

The plaintiff in the above-entitled cause will please take notice that on Thursday, the ——— day of ———, 19—, at

[13] See W. Va. Code, 1913, c. 132, § 1a(1); 4 Desty. Fed. Proc., 635.

two o'clock P. M. of that day, before the judge of said court, at chambers, in the town of ———, county of ———, and state aforesaid, the defendant, C——— D———, will move the said judge to dissolve the injunction heretofore granted in the said cause against the said C——— D———; and that said motion will be based on the papers, filings and proceedings in said cause, and also upon the answer of the defendant to be then filed [*if the answer has not already been filed*].

Yours respectfully,

C——— D———,
By Counsel.[14]

Dated, ——— day of ———, 19—.

J——— C——— H———,
Solicitor for the Defendant.

No. 294.

§ 1158. Of application for a rehearing of a decree entered by default.

[*After giving the title of the cause and the court wherein pending, as in No. 293, proceed as follows:*]

The plaintiff in the above cause is hereby notified that the undersigned, the defendant therein, will make application on the ——— day of the September term, 19—, of the circuit court of ——— county, and state of ———, to rehear, by petition then to be filed, a decree rendered in the above-entitled cause by default of any appearance therein, and which decree was rendered on the ——— day of ———, 19—, and because of the following errors therein: [*here set forth the errors in consecutive order*];[15] at which time and place he may attend and

[14] The foregoing form is taken substantially from 4 Desty, Fed. Proc., 591.

[15] In Slingluff v. Gainer, 49 W. Va. 7, 37 S. E. 771, it is decided that on a motion to reverse a decree by default, the errors must be specified in the notice of the motion, or on the record in the motion, or in a written assignment of errors filed as a part of the record.

In the course of his opinion in this case, Brannon, J., says: "There are some errors remediable by ap-

show cause, if any he can, why said petition should not be filed and said case reheard.

C——— D———,
Defendant,
By Counsel.

H——— L——— W———,
Solicitor for the Defendant.

No. 295.

§ 1159. That a commissioner's report has been completed.

A——— B———
v. } In Chancery.
C——— D———.

Pending in the circuit court of ——— county, West Virginia.

To E. F. and G. H., attorneys of record of the parties to the above cause:

You are hereby notified that the report made by me in said cause under the decree of reference entered therein was by me completed on the ——— day of ———, 19—, and the said report is now in my office, together with the evidence, where you may examine the same if you so desire.

J. W.,
Commissioner in Chancery for the County of ———
and State of ———.[16]

peal, some by motion. The Code prohibits us from reversing a decree by default until the errors in it are presented to the court below. How can this court say on appeal that for given errors there was a motion to reverse, unless we can affirmatively see that those errors have undergone review in the court below? In *Gunn* v. *Turner*, 21 Grat. 382, it is held that the notice must specify errors. This has, perhaps, been overruled in *Saunders* v. *Griggs*, 81 Va. 506; but, as I Bart., Law Prac., 574, asserts, the former decision is clearly the better one. It does not appear to us that those alleged errors have been presented to the circuit court as ground for the reversal of the decree. They clearly have not been presented there. The appellant must show that they have been." Also see, Gebhart v. Shrader, 75 W. Va. 159, 170, 83 S. E. 925.

But see, Morgan v. Ice, 80 W. Va. 273, 276, 92 S. E. 340.

In Saunders v. Griggs, 81 Va. 506, it is held that in a notice to correct or reverse a judgment or decree by default no errors need be specified.

[16] This notice is formulated from the provisions of the statute of West Virginia, Code, c. 129, § 7.

No. 295*a*.

§ 1160. To correct decree wherein there is clerical error.

A——— B———
v. } In Chancery.
C——— D———.

In the ——— court of the county of ——— and state of ———.

The plaintiff in the above cause is hereby respectfully notified that the undersigned defendant therein will move the said court [*or* the judge thereof in vacation, *specifying in the notice where the motion will be made*], on the ——— day of ———, 19—, to correct a final decree rendered in said cause on the ——— day of ———, 19—, in the following particular, to-wit: [*here briefly designate the error to be corrected*].

C——— D———,
Defendant,
By Counsel.

J——— S——— K———,
Solicitor.[17]

No. 296.

§ 1161. Of taking an account by a commissioner in chancery.

Commissioner's office ———, ——— day of ———, 19—.

The parties in the suit of ——— v. ———, etc., will take notice, that on the ——— day of ———, 19—, at my office, in the town of W———, I will proceed to execute the decree rendered in said cause by the circuit court of ——— county on the ——— day of ———, 19—, when and where they are required to attend with such books, papers, vouchers and evidence, as will enable me to comply with the said order of court.

M. G———,
Master Commissioner of ——— Court of ———.[18]

[17] This motion is based upon a statute existing in the Virginias. See *ante*, § 373, and notes; Shumate v. Crockett, 43 W. Va. 491, 27 S. E. 240; W. Va. Code, 1913, c. 134, §§ 1, 5; Va. Code, 1904, §§ 3447, 3451.

[18] The foregoing form is given from 2 Bart., Ch. Pr. (2nd Ed.), 1321.

No. 296*a*.

§ 1162. To divorce commissioner of hearing of cause.

To A——— B———, Divorce Commissioner for the County of ———, in the State of West Virginia:

You will please take notice that the undersigned J——— M———, plaintiff in the divorce cause in which L——— M——— is defendant, which cause is now pending in the circuit court of said county, will demand a trial of the said cause at the next regular term of said court beginning on the ——— day of ———, 19—.

[*If the post-office address of the defendant has not been stated in the bill, add the following paragraph:*]

The post-office of the said defendant is ———.

Dated the ——— day of ———, 19—.

J——— M———,
By Counsel.[19]

H——— S———,
Counsel.

[19] This form is based upon the requirements of the West Virginia statute, as amended by Acts of 1915. W. Va. Code, 1916, c. 64, § 17; Acts 1915, c. 73.

CHAPTER XLIX

REPORTS

§ 1163. Of a commissioner in chancery upon a reference for an account.
§ 1164. Of sale by a special commissioner.
§ 1165. Of commissioners appointed to assign dower.
§ 1166. Of commissioners appointed to make partition of real estate, where partition is made.
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§ 1171. Of a commissioner upon exceptions to an answer.
§ 1172. Of a commissioner in a suit to surcharge and falsify the settlement of the accounts of a fiduciary.
§ 1173. Of sale of property under an order of attachment.

No. 297.

§ 1163. Of a commissioner in chancery upon a reference for an account.

State of ———,
County of ———, ss:

A——— B———
v. } In Chancery.
C——— D———.

Pending in the Circuit Court of said County.

To the Honorable ———, Judge of the said Court:

†Pursuant to a decree of reference made and entered in this cause on the ——— day of ———, 19—, whereby the said cause was referred to the undersigned commissioner in chan-

cery to take and state an account showing [*here copy from the decree the matters to be reported upon*], the undersigned gave due notice to the parties, as required by the terms of said decree, that on the ——— day of ———, 19—, he would proceed, at his office in the town of ———, county and state aforesaid, to execute said order; but the plaintiff failing to appear the examination and proceedings were adjourned until the ——— day of ——— 19—, and due notice thereof given to R. N. H., plaintiff's solicitor, when the plaintiff appeared by his said solicitor and the defendant in person, as well as by his solicitor, J. A.; whereupon your commissioner duly examined the witnesses produced by both parties touching the matters of inquiry before him, reducing their examination to writing in the form of depositions, which are herewith returned and made part of this report. And also examined the documentary proofs before your commissioner which are also herewith returned.

And thereupon, upon due consideration of all which your commissioner respectfully submits the following report:

[*Here present a concise statement of the findings of the commissioner on the various matters referred with a reference to the proof on which he bases the finding on each item or head of reference; or as may be most appropriate, a general reference at the conclusion of the report as follows: Reference is made to schedules A., B. and C., hereto annexed or herewith filed as part of this report.*]

All of which is respectfully submitted this ——— day of ———, 19—.

L——— B———,
Commissioner in Chancery.[1]

[1] See Bart., Suit in Eq. (Ingersoll Ed.), 123; Jackson v. Hull, 21 W. Va. 603; also Dewing v. Hutton, 40 W. Va. 521, 21 S. E. 780; Hanly v. Potts, 52 W. Va. 263, 43 S. E. 218.

No. 298.

§ 1164. Of sale by a special commissioner.

To the Honorable ———, Judge of the Circuit Court of ——— County, State of ———:

We, the undersigned special commissioners, respectfully report unto Your Honor that by virtue of a decree of the circuit court of ——— county, in the chancery cause of L. J. M. v. E. S. *et al.*, rendered at the October term, 19—, of said circuit court, after having advertised the time, terms and place of sale in the W——— R———, a newspaper published in ———, ———, for four successive weeks, we, the said commissioners, offered and exposed for sale, at the front door of the courthouse in said county, the real estate in the bill and proceedings in said cause mentioned, on the ——— day of October, 19—, at which sale E. S. became the purchaser of the one undivided half of lot No. 10 [*here describe the lot*], he being the highest bidder, for the sum of ——— dollars; and the said E. S. having the first lien on said lot by virtue of the decree aforesaid for the sum of ——— dollars, his claim being more than the purchase money of said property, we neither required him to pay any money nor to give bond, but respectfully ask that a decree be rendered against said E. S. for the costs of the suit and commissions and costs of sale herein if the money otherwise obtained, as hereinafter shown, be insufficient for that purpose.

We also offered for sale on that day, at the courthouse of said county, lot No. 11 [*here describe the lot*], of which said L. J. M. became the purchaser for the sum of $———, she being the highest bidder therefor.

We further report that she paid us in hand the cash instalment of $———, and executed her three several bonds [*or* notes] for $——— each, with A. R. B. as her security, payable in *6*, *12* and *18* months, respectively, with interest from day of sale; that we believe said property brought a fair price at said sales, and would most respectfully recommend that said sales be confirmed.

We herewith return said notes and a certified check of the Bank of ———, payable to our order, for the sum of $———, the amount of the cash payment of L. J. M. on the above-described lot, in which bank said cash payment has been deposited.

All of which is respectfully submitted.

J. B. M.,
W. H. T.,
Special Commissioners.[2]

No. 299.

§ 1165. Of commissioners appointed to assign dower.

State of ———,
County of ———.

Jane D———
v.
James D——— and Julia D———. } In Chancery.

Pending in the circuit court of the county and state aforesaid.

To the Honorable ———, Judge of the said Court:

* We, the undersigned commissioners appointed by this court by the interlocutory decree made and entered in said cause on the ——— day of *May,* 19—, to assign the dower of Jane D., widow of John D., deceased, in the property hereinafter described, situate in the county of S———, respectfully report that we, having been first duly sworn as required by law faithfully and impartially to execute the trust reposed in us, did on the ——— day of *May,* 19—, meet on the premises hereinafter

[2] See 13 Enc. Forms, 535-540; 4 Desty, Fed. Proc., 639; Hartley v. Roffe, 12 W. Va., at p. 416; Laidley v. Jasper. 49 W. Va. 526, 39 S. E. 169.

When a report of a judicial sale states that the sale was made "after advertising the sale in the manner and for the time required by the said order," it will be taken that the publication and posting of notice of sale required by the court's order were made, unless the contrary appear. Laidley v. Jasper, 49 W. Va. 526, 39 S. E. 169.

described, in obedience to the mandate of, and in conformity to the requirements of, said decree. Jane D., by J. M., her attorney, and the said James D. and Julia D., heirs at law of the said John D., in person, appeared at the time and place aforesaid. Whereupon we caused a survey to be made of the lands and premises particularly described in said decree, that is to say [*describing particularly the lands and premises*], a map of which survey is hereto annexed and made a part of this report.

We do further report that we have assigned and laid off to the said Jane D. for her dower the one-third part of said premises as follows: [*here particularly describe the part set off as dower*].

We do further report that our charges attending said assignment, including our fees as commissioners, are as follows, to-wit: [*here set out itemized account*].

In witness whereof we have hereunto set our hands this ——— day of October, 19—.

———

———

———

No. 300.

§ 1166. Of commissioners appointed to make partition of real estate, where partition is made.

State of ———,
County of ———.

John D———, Plaintiff,
v.
Richard R———, Jane D———, Samuel S——— and William W———, Defendants. } In Chancery.

Pending in the circuit court of the county and state aforesaid.

To the Honorable ———, Judge of said Court:

** The undersigned, commissioners appointed by a decree rendered by this honorable court in the above-entitled cause to

make partition of the real estate in the bill and proceedings in said cause mentioned and described, respectfully submit the following report of their action in the premises:

They report that they were first duly sworn according to law, and attached to the accompanying report is a copy of the oath by them severally taken and subscribed.

They further report that they caused to be served upon all the defendants in said cause reasonable notice of the time when, to-wit, on the ——— day of ———, 19—, they would enter upon said real estate and make partition thereof, as will appear from a copy of said notice and the return of service thereon hereto attached as a part of this report, marked "Exhibit A."

They further report that, after having taken said oath and caused such notice to be served as aforesaid, they went, on the ——— day of *November,* A. D. 19—, upon the said premises and viewed the same, each of the said commissioners being then and there present; that the lands mentioned in the bill and proceedings of said cause are described as follows, to-wit: [*describing them*], situate in the county of G——— and state of W———

* They further report that, in the judgment of the undersigned, the above-mentioned lands are susceptible of division without manifest prejudice to the parties in interest.

They further report that in pursuance of said decree the undersigned then proceeded to make partition and division of the said lands, and by sufficient metes and bounds to divide, sever and set off the same, quantity and quality being by them relatively considered, to and among the several persons hereinafter mentioned, in severalty, according to their respective rights and interests therein, as the same were adjudged, ordered and directed by the court, and that they have made partition and division of said lands as follows, viz:

To Richard R. they assigned one-fourth portion of said land, as follows: [*Describing the land assigned to Richard R.*]

To Jane D. they assigned one-fourth portion of said land, as follows: [*Describing the land assigned to Jane D.*]

To Samuel S. they assigned one-fourth portion of said land, as follows: [*Describing the land assigned to Samuel S.*]

To William W. they assigned one-fourth portion of said land, as follows: [*Describing the land assigned to William W.*]

The undersigned further report that they employed Charles C., a surveyor, and the necessary assistants to aid them in making said partition, and that for the better understanding of the location and shape of the aforesaid lands they have caused a map thereof to be made, by which the parts allotted to the respective parties are shown, which said map is hereto attached and made a part of this report, marked "Exhibit B."

°The undersigned further report that the items of the various expenses attendant upon the execution of the aforesaid decree and order, including the fees of the undersigned commissioners, is hereto annexed and made a part of this report, marked "Exhibit C."

Witness our hands this ——— day of ———, 19—.

———

———

——— ———[3]

No. 301.

§ 1167. Of commissioner as to whether minor's interest will be promoted in a suit to sell infant's lands.

State of ———,

County of ———.

A——— B———, Guardian of C——— D———, a Minor, v. C——— D———. } In Chancery.

Pending in the circuit court of said county and state.

To the Honorable ———, Judge of said Court:

*Your commissioner (the parties duly acknowledging service of notice of the time and place of executing the decree made in

[3] There must not be less than three commissioners, any two of whom may act. Hogg, Eq. Princ., § 376.

The report should show that notice of the time of partition was given to all parties interested. Wamsley v. Mill Creek Coal and

above-entitled cause on the ——— day of ———, 19—), proceeded at his office on the ——— day of ———, 19—, to perform the duties required of him by said decree. In making the inquiries therein directed he took the examinations of Wellington G. and A. D. W. on interrogatories agreed on by John H., guardian *ad litem* of the infant defendant Robert P. Your commissioner also took the examination of James M. T. At the examination of Mr. T., John H., guardian *ad litem* was present in person. These examinations of witnesses and the notice aforementioned are returned with this report. And from the evidence thus furnished, your commissioner now reports:

1. That the interest of the infant defendant Robert P. will be promoted by the sale of the property mentioned in the bill, and the investment of the proceeds of sale in other property.

2. The rights of no person will be violated by the sale.

Respectfully submitted,

A——— S———,
Commissioner.[4]

No. 302.

§ 1168. Of sale of special commissioner in a suit to sell infant's lands.

[*As in No. 301 to the * and then proceed as follows:*]

The undersigned commissioner appointed by the decree made in the above cause, proceeded to execute the duties thereby enjoined upon him. Believing it would enhance the price obtained for the land, your commissioner directed the surveyor, Mr. Henry P., to lay off the land into three tracts as nearly equal as possible. He did so, and made a plat and survey of

Lumber Co., 56 W. Va. 296, 49 S. E. 141; Robertson Consolidated Land Co. v. Paull, 63 W. Va. 249, 59 S. E. 1085.

The foregoing form is constructed from the principles laid down in Hogg, Eq. Princ., § 376, and the cases above cited.

[4] The foregoing form is taken from Sands, Suit in Equity (2nd Ed.), 551. See Lancaster v. Barton, 92 Va. 615, 24 S. E. 251.

the land; tract A, embracing the dwelling house containing 186 acres; tract B, containing 216 acres, and tract C containing ——— acres. After advertising the time, place and terms of sale in the ———, a newspaper published in ———, once a week for ——— weeks and posting notice of the sale at the front door of the court house, and at ——— and ——— in this county, your commissioner proceeded to sell at public auction, to the highest bidder, on the premises [*or*, at the front door of the court house of this county] on the ——— day of ———, the said land in three parcels:

For tract A, containing 186 acres, Lewis M. made the highest bid and became the purchaser at $3,200.

For tract B, containing 216 acres, James G. made the highest bid and became the purchaser at $3,240; and

For tract C, containing ——— acres, Richard R., having made the highest bid, became the purchaser at $2,100.

The purchasers, Lewis M. and James G., have complied with their purchases by paying the cash installment and giving bonds for the credit installments.

Mr. Richard R. has failed thus far to comply. He claims that the title to the land purchased by him is not a good title and alleges other objections to the sale. He requests your commissioner to return with this report his letter containing the objections he makes to the title. He states that when these objections are removed he will comply with his purchase. Your commissioner reports the facts to the court for its action in the premises.

Deducting from the cash installments, amounting to.. $———
The fee of surveyor.....$———
The fee of counsel.....$———
Costs of advertising.....$———
Costs of posting notices.....$———
Commissions of commissioner on the $6,440...$———
$———

Your commissioner has deposited the residue of the cash installments, $———, in the ——— Bank, to the credit of the court in this cause and returns herewith a certificate of such deposit. He also returns the bonds of the purchasers given for the credit installments.

Your commissioner has given bond required by the decree directing the sale.

Respectfully submitted,

A——— S———, Comm'r.[5]

No. 303.

§ 1169. Of commissioners appointed to make partition, that lands are not susceptible of partition.

[*As in No. 300 to the * and then proceed as follows:*] it appears to them [*or* to a majority of them] that partition thereof [*or, if a portion of the land can not be partitioned, say,* "that partition of the following lot or 'tract' or 'portion thereof,' *to-wit,*" *describing it*] can not be made without great prejudice to the owners, for the reasons following, to-wit: [*stating reasons*].

[*Conclude as in No. 300 from the* °.]

No. 304.

§ 1170. Of commissioners appointed to assign dower and make partition among the heirs at law.

[*After the title and commencement, as in No. 300, down to the **, then proceed as follows:*]

The undersigned commissioners, appointed by a decree rendered by this honorable court in the above entitled cause to assign dower in and make partition of the land in the bill and proceedings in said cause mentioned and described, respectfully submit the following report of their action in the premises:

They report that they were first duly sworn according to law,

[5] The foregoing form is taken from Sands, Suit in Equity (2nd Ed.), 555.

and attached to the accompanying report is a copy of the oath by them severally taken and subscribed.

They further report that they caused to be served upon all the defendants in said cause reasonable notice of the time when, to-wit, on the ——— day of ———, 19—, they would enter upon said real estate and make assignment of dower therein and partition thereof, as will appear from a copy of said notice and the return of service thereon hereto attached as a part of this report, marked "Exhibit A."

They further report that after having taken said oath and served said notice as aforesaid they went on the ——— day of ———, 19—, upon the said premises and viewed the same, each of the said commissioners being then and there present; and upon actual view of the premises did set off and assign to the said J. D., as her dower in the lands, in the bill and proceedings in this cause mentioned and described, the following tract, to-wit: [*here describe it*]; and that they made partition of the residue of said lands as follows:

To the said R. R., one-fourth part thereof. [*Here describe the same by metes and bounds.*]

To the said S. S., one-fourth part thereof. [*Here describe the same by metes and bounds.*]

To the said W. W., one-fourth part thereof. [*Here describe the same by metes and bounds*]; and

To the said R. W., one-fourth part thereof. [*Here describe the same by metes and bounds.*]

[*Conclude as in No. 300 from the* °.] [6]

No. 305.

§ 1171. Of a commissioner upon exceptions to an answer.

[*As in No. 297 to the* †, *then proceed as follows:*]

In pursuance of an order of this honorable court made in the above entitled cause on the ——— day of ———, 19—, where-

[6] See Brown v. Brown, 67 W. Va. 251, 67 S. E. 596, 28 L. R. A. (N.S.) 125.

by the cause was referred to the undersigned as commissioner in chancery of this court, to look into the plaintiff's bill of complaint which is filed in this cause, the answer of the defendant, C——— D———, thereto, and the exceptions taken by the plaintiff to said answer, and to report to this court with all convenient speed whether said exceptions are well taken or not, the undersigned commissioner respectfully reports that, having been attended by the counsel of the respective parties, and having looked into said bill and answer, and the exceptions taken thereto, and having heard the arguments of the respective counsel in relation to said exceptions, and having duly considered said bill, the answer, and arguments, he is of opinion and so reports that the first, second, fifth and seventh exceptions are well taken; and that the ninth and all the other exceptions are not well taken. All of which is respectfully submitted.

W——— M———,
Commissioner in Chancery.

Dated, ——— day of ———, 19—.

No. 306.

§ 1172. Of a commissioner in a suit to surcharge and falsify the settlement of the accounts of a fiduciary.

[*As in No. 299 to the *, and then proceed as follows:*]

Your commissioner examined the papers of the said cause, and accounts heretofore filed by the said executor, A——— W——— S———, and he finds that the said executor is liable to be charged with the following amounts due on notes and deeds of trust securing the same: [*Here specify the notes, their dates, amounts, by whom given and to whom payable, and tabulating them in orderly and systematic arrangement.*]

Your commissioner further finds that the said executor is entitled to the following credits on account of disbursements, which were not given him in a former settlement of his accounts: [*Here set forth particularly all the disbursements.*]

Your commissioner further finds that there is now in the hands of the said executor, A——— W——— S———, including the interest thereon to date, the sum of ——— dollars.

All of which is respectfully submitted this ——— day of ———, 19—.

N. P.,
Commissioner in Chancery.[7]

No. 307.

§ 1173. Of sale of property under an order of attachment.

[*As in No. 299 to the *, then proceed as follows:*]

In pursuance of a decree made in the above cause, heard on the ——— day of ———, 19—, whereby the undersigned was appointed a special commissioner to make sale of the lands and tenements levied on by virtue of the attachment issued in the above cause, or so much thereof as may be necessary to satisfy the debts of the plaintiff, the undersigned does hereby report as follows: that he advertised the time, terms and place of sale, as required by said decree of sale, in the ———, a newspaper published in said county, for four successive weeks next preceding the time fixed for making said sale, and posted said notice of sale at the front door of the court house of said county for a like period; that the undersigned fixed upon the ——— day of ———, 19—, as the time, and the front door of the court house of said county as the place, for making said sale.

Your commissioner further reports that he sold said lands to J——— S———, who was the highest bidder therefor, for the sum of ——— dollars; that said J——— S——— made a cash payment of ——— dollars of the purchase money thereof, and executed his note payable in ——— months for the residue thereof, with J——— F——— as his surety.

Your commissioner further reports that he deposited said

[7] The foregoing form is substantially taken from the case of Seabright v. Seabright, 28 W. Va. 412.

cash payment in the ——— Bank, for which he took a certificate of deposit, which, together with the said note, your commissioner herewith returns.

Your commissioner further reports that he gave bond in the penalty of ——— dollars with ——— as his security, as required by said decree; that he herewith returns copies of the notices of sale as published and posted as above stated.

All of which is respectfully submitted.

P——— Q———,
Special Commissioner.

Dated this ——— day of ———, 19—.

CHAPTER L

EXCEPTIONS

§ 1174. To an answer for insufficiency.
§ 1175. To an answer for impertinence and scandal.
§ 1176. To the report of a commissioner in chancery.
§ 1177. To a special commissioner's sale.
§ 1178. To the report of a commissioner assigning dower.
§ 1179. To the report of commissioners making partition of real estate.
§ 1180. To the sufficiency of an attachment bond.

No. 308.

§ 1174. To an answer for insufficiency.

James Willis, by his next friend, etc., v. Edward and William Willis. } In Chancery.

Pending in the ——— Court of ——— County, State of ———.*

Exceptions taken by the said complainant to the joint answer of the said defendants to his bill of complaint in this cause:

First. For that the said defendants have not, according to the best of their information, knowledge and belief, set forth and discovered in their said answer, whether the said testator, Thomas A., in the complainant's said bill named, duly made and executed such last will and testament in writing, of such date, and of such purport and effect as in said bill mentioned, etc. [*Pursuing the words of such interrogatories of the bill as are not sufficiently answered.*]

Second. For that the said defendants have not, according to the best of their knowledge, information and belief, set forth and answered whether the said complainant hath or hath not, by his father and next friend, applied to the said defendant, etc., or how otherwise.

In all which particulars the complainant is advised that the answer of the defendant is altogether evasive, imperfect and insufficient. Wherefore said complainant doth except thereto, and prays that the defendants may be compelled to amend the same, and to put in a full and sufficient answer to the complainant's bill.

S. S.,
Solicitor for the Plaintiff.[1]

No. 309.

§ 1175. To an answer for impertinence and scandal.

[*As indicated in No. 308 to the *, and then as follows:*]

Exceptions taken by A. B., the complainant, to the answer [*or* separate answer] of C. D., the defendant [*or* one of the defendants], in this cause, for impertinence and scandal.

First Exception: For that the said answer, beginning with the words "then being," in the first line on the second page thereof, to and including the words "this defendant," in the seventh line on the third page thereof, is impertinent and ought to be expunged.

Second Exception: For that said answer, commencing in the fourth line on the fifth page thereof with the words following, to-wit: "That at the commencement of the said partnership," and ending on the ninth line of the sixth page thereof with the words "discounted at the said bank," is scandalous and impertinent, and ought to be expunged.

In all which particulars the complainant humbly insists that said answer is irrelevant, impertinent and scandalous: wherefore said complainant excepts thereto, and humbly prays that the impertinence and scandal of the said answer excepted to as aforesaid may be expunged, with costs.

B——— F——— B———,
Solicitor for the Complainant.

[1] The foregoing form is taken from Bart., Suit in Equity, 105. See *ante*, § 439.

No. 310.

§ 1176. To the report of a commissioner in chancery.

[*After the style of the cause and the court in which it is pending, proceed as follows:*]

Exceptions taken by E. F., one of the above-named defendants, to the report of Commissioner J. M. A., to whom this cause was referred by decree made herein on the ——— day of ———, 19—, and which report bears date on the ——— day of ———, 19—.

First Exception: For that said commissioner [*here set forth specifically the grounds of the exception*].

Second Exception: For that the said commissioner [*here set forth specifically the ground of the second exception, and continue until all exceptions are taken*].

Wherefore the said defendant doth except to the said report of the said commissioner and prays that his said exceptions may be sustained, that the said report may be corrected in the manner indicated by said exceptions [*or that the said report may be recommitted, or whatever is necessary to be done to meet the purposes of the exceptions*].

W——— H———,
Solicitor for the Defendant.[2]

No. 311.

§ 1177. To a special commissioner's sale.

[*After the style of the cause and the court in which it is pending, proceed as follows:*]

Exceptions taken by the defendant to the sale made in the above cause by E——— F———, special commissioner.

The defendant, C——— D———, excepts to the sale of the real estate made on the ——— day of ———, 19—, by E——— F———, special commissioner in said cause, upon the following grounds: *

[2] See Bart., Suit in Eq, 124; Mitford and Tyler, Eq. Pl. and Pr., 642.

First. Because [*here set forth the first ground*].

Second. Because [*here set forth the second ground, and continue until all the grounds of exception are set forth*].

Wherefore the said defendant prays that his said exceptions may be sustained; that the said sale may be set aside; and that the property may be resold under the decree of sale entered in this cause.

[*And if it is desired to have the property sold in separate lots instead of as a whole, and the decree does not so provide, and the commissioner has failed to do so, though it is his duty so to do in the absence of special directions, ask the court for specific directions as to the mode of sale.*]

J——— F——— E———, C——— D———,
Solicitor for the Defendant. By Counsel.

No. 312.

§ 1178. To the report of a commissioner assigning dower.

[*Here proceed as in No. 311, mutatis mutandis, down to the* *.]

First. Because the assignment of dower is not made by proper metes and bounds.

Second. Because the said commissioners were not sworn as required by the decree appointing them.

Third. Because [*here set forth any other ground*].

Wherefore the said defendant prays that her said exceptions may be sustained; that said dower may be assigned by proper metes and bounds; and that the said assignment may, in all respects, be made as required by the decree directing the assignment, and as the law in such case provides.

H——— F——— U———, C——— D———,
Solicitor. By Counsel.

No. 313.

§ 1179. To the report of commissioners making partition of real estate.

[*As in No. 311, mutatis mutandis, to the *, and then proceed as follows:*]

First. Because the said commissioners, in making their said report, did not assign to the defendant, J——— H———, his equal one ———th part of said real estate.

Second. Because the said commissioners allotted to the defendant, E——— F———, more than his equal one ———th part of the premises to be partitioned.

In support of these exceptions the defendant here files the affidavits of L——— M——— and W——— P———; wherefore the defendant excepts to the report of the commissioners in the above cause, and prays that his said exceptions may be sustained; that the said commissioners be required to make other and correct partition of said real estate, according to the decree appointing them; that they be specially instructed so to make partition that the exceptor shall receive his equal one ———th part of the premises to be partitioned.

J——— H——— S———, J. H.,
Solicitor for J——— H———. By Counsel.

No. 314.

§ 1180. To the sufficiency of an attachment bond.

[*After the style of the cause and the court in which it is pending, proceed as follows:*]

Exceptions taken by the defendant to the attachment bond filed in the above cause.

The defendant excepts to the bond executed by the plaintiff as principal and W——— C——— L——— and L——— M——— as his sureties, bearing date on the ——— day of ———, 19—, and upon which possession was taken of the property levied on in this cause:

First. Because [*here set forth the ground of exception*].

Second. Because [*here set forth the further ground of exception until the exceptions are all taken*].

Wherefore the defendant prays that his said exceptions may be sustained; that the plaintiff be required to give a good and sufficient bond within a reasonable time, as the court shall in its discretion direct; and in default thereof that the property attached herein be returned to the possession of this defendant.

J——— L——— K———, C——— D———,
Solicitor for the Defendant. By Counsel.[3]

[3] See W. Va. Code, 1913, c. 106, § 6.

CHAPTER LI

ORDERS AND DECREES

§ 1181. Striking plea in abatement from the record.
§ 1182. Setting plea down for argument.
§ 1183. Holding plea in abatement insufficient upon argument.
§ 1184. Referring cause to a commissioner to take an account in a suit against the estate of a decedent.
§ 1185. Referring cause to a commissioner to take an account in a creditors' suit to enforce judgment liens.
§ 1186. Referring cause to a commissioner in a suit to surcharge and falsify the settlement of the accounts of a fiduciary.
§ 1187. Amending bill before appearance by the defendant.
§ 1188. Allowing bill to be amended after an appearance and demurrer.
§ 1189 Allowing bill to be amended after answer filed by the defendant.
§ 1190. Allowing bill to be amended by adding new parties, and remanding cause to rules for that purpose.
§ 1191. Allowing bill to be amended to conform to the proofs and without prejudice to an injunction issued in the cause.
§ 1192 Allowing the return on a summons to be amended.
§ 1193. Allowing an answer to be amended.
§ 1194. Entering motion to quash an attachment, and overruling the same.
§ 1195. Entering motion to quash an attachment and sustaining said motion.
§ 1196. Filing plea in abatement of an attachment.
§ 1197. For specific personal property embodying an order of sale under the laws of Virginia.
§ 1198. Filing petition of third party making claim to the property attached or to some interest therein.
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No. 315.

§ 1181. Striking plea in abatement from the record.

A——— B———
v.
C——— D———. } In Chancery.

* This day the plaintiff moved the court to strike from the record of this cause the plea in abatement filed therein at rules, which motion is set down for argument; and the matters of law arising thereon being argued by counsel and considered by the court, said motion is hereby sustained and said plea stricken from the record of this cause, as constituting no defense thereto.[1]

[1] *Ante*, § 315.

This form is based upon the decision of the court in Simpson v. Edmiston, 23 W. Va. 675. In this case a plea in abatement was filed after a decree *nisi*, when it was too

No. 316.

§ 1182. Setting plea down for argument.

[*After the caption, as in No. 315, to the* *.]

Upon motion of the plaintiff [*or* defendant, *as the case may be*], the defendant's plea in bar filed in this cause is here set down for argument.[2]

No. 317.

§ 1183. Holding plea in abatement insufficient upon argument.

[*As in No. 315 to the* *.]

The matters of law arising upon the argument as to the plea in abatement filed in this cause having been by the court duly considered, it is hereby adjudged, ordered and decreed that said plea be and the same is hereby taken and held as insufficient to constitute any defense to the plaintiff's bill, and that said plea be and the same is hereby overruled.[3]

No. 318.

§ 1184. Referring cause to a commissioner to take an account in a suit against the estate of a decedent.

A——— B———, who sues on behalf of himself and all other creditors of J——— K———, deceased,
v.
C——— D——— and others.
} In Chancery.

This cause came on this day to be heard upon the process duly served upon the defendants; upon the bill regularly filed

late under the statute to file a plea in abatement. The plaintiff afterwards moved the court to strike this plea from the cause, which was done, and the action of the court in thus disposing of the plea was affirmed on appeal. Under the present statute, however, a plea in abatement may be filed after entry of a decree *nisi*.

[2] See *ante*, § 416.

[3] That the sufficiency of a plea is determined by setting same down for argument, see *ante*, § 416.

at rules, the decree *nisi* thereon, and taken for confessed and set for hearing at rules by the plaintiff as to the defendants, C———, D—— and E——— F———; upon the separate answer of G——— H———, administrator of J——— K———, deceased, and general replication thereto; upon the answer of M——— N———, guardian *ad litem* of the infant defendants, L——— K——— and P——— K———, and general replication thereto; upon the depositions on behalf of the plaintiff taken and filed in the cause; and was argued by counsel.*

Upon consideration of all which it is adjudged, ordered and decreed that this cause be and the same is hereby referred to T——— N———, one of the commissioners in chancery of this court, to take, state and report an account, showing:

First, what personal estate the said J——— K——— owned at the time of his death, the character and value thereof;

Second, what disposition, if any, was made of said personal estate by the defendant, G——— H———, administrator of J——— K———, deceased, and how much, if any, of said personal estate is now in the hands of said G——— H——— as administrator, available for the payment of any debts owing from the estate of said J——— K———, deceased;

Third, a settlement of the administration of the estate of said decedent by said G——— H———, his administrator;

Fourth, what debts said J——— K——— owed at the time of his death, to whom they are payable, their nature, and their respective amounts and priorities;

Fifth, what real estate was owned by the said J——— K——— at the time of his death, its quantity, description and location;

Sixth, and such other matters as any party in interest may require, the same being pertinent, or such other matters as said commissioner himself may deem pertinent, whether so requested or not.

But before proceeding to take said account the said commissioner is hereby directed to see that the clerk of the circuit court of this county shall publish the notice to creditors of said decedent as required by ch. 86, sec. 8, of the Code of West

Virginia,[4] and † said commissioner shall give notice ‡ to all the parties to this suit of the time and place of taking the said account by publication thereof for ———, in some newspaper published in this county, or by personal service of such notice on the parties or their counsel.

And what the said commissioner shall do under this decree he shall report to the next term of this court, until which time this cause is continued.

No. 319.

§ 1185. Referring cause to a commissioner to take an account in a creditors' suit to enforce judgment liens.

[*After the title and proper recitals, as indicated in No. 318 to the* °.]

First, all the real estate owned by the judgment debtor, C——— D———, where situate, its description and the quantity thereof;

Second, the liens upon said real estate, by whom held, their respective amounts and priorities;

Third, whether said real estate will in five years rent for a sufficient sum to pay off and discharge said liens and the costs of this suit;

Fourth, and such other matters as any party in interest may require, the same being pertinent, or such other matters as said commissioner himself may deem pertinent, whether so required or not.

But before proceeding to take said account, the said commissioners shall publish the notice to lienholders as required

[4] See *ante,* § 629.

This part of the decree directing the commissioner to see that the clerk publish the notice to the creditors of the decedent is not required by the statute, as it is one of the official duties of the clerk; but it is here inserted as part of the form as a suggestion to be embodied in decrees of this character, that so essential a step in such a case may not be omitted, so that possible delay and error may thus more likely be avoided.

by ch. 139, sec. 7, of the Code of West Virginia, and [*conclude as in No. 318 from the* †].[5]

No. 320.

§ 1186. Referring cause to a commissioner in a suit to surcharge and falsify the settlement of the accounts of a fiduciary.

[*After the style of the suit, and the recital of the matters upon which the cause is heard.*]

Upon consideration of all which the court is of opinion to and doth hereby refer this cause to J——— C——— W———, one of the commissioners in chancery of this court, to take an account and report upon the following matters:

First, any and all omissions committed and made by E——— F———, administrator of the estate of C——— D———, deceased, in his settlement of the estate of said decedent, treating such settlement as *prima facie* correct as to all matters embodied in it, except such as may be specifically pointed out and proved to be erroneous;

Second, whether the specific items mentioned in the plaintiff's bill as personal property belonging to the estate of C——— D———, deceased, did belong to the said estate, and if so, whether such items are properly chargeable to said E——— F———, as such personal representative;

Third [*here set out any other matter to be reported upon, until the scope of the inquiry is covered*].

But before proceeding to take said account said commissioner shall give notice [*conclude as in No. 318 from the* ‡].[6]

[5] See the case of Neely v. Jones, 16 W. Va., pp. 628, 629.

[6] This form is founded upon the principles announced and proceedings had in Seabright v. Seabright, 28 W. Va. 412; Radford v. Fowlkes, 85 Va. 820, 8 S. E. 817; Leach v. Buckner, 19 W. Va. 36; Corbin v. Mills, 19 Gratt. (Va.) 438, 456. See also, Sands, **Suit in Eq.**, 520, 521.

No. 321.

§ 1187. Amending bill before appearance by the defendant.

[*After the title of the cause.*]

This day, before any appearance by the defendant, the plaintiff amends his bill at bar in several important particulars as shown by the amendments themselves on a separate paper, marked "Amendments to Bill."[7]

No. 322.

§ 1188. Allowing bill to be amended after an appearance and demurrer.

[*After the title to the cause.*]

This day the defendant filed a demurrer to the plaintiff's bill which demurrer is here set down for argument; and the matters of law arising thereon being argued by counsel and considered by the court, the said demurrer is hereby sustained, and said bill adjudged not to be sufficient in law.°

And thereupon the plaintiff moved the court for leave to amend his bill of complaint; and the court being of opinion that the insufficiency of the bill is such as may be relieved by amendment, the plaintiff hath leave to amend his said bill, but * such amendment is directed to be made on a separate paper or in such manner as to show in what particulars the said bill is amended.[8]

[7] As we have seen, *ante*, § 344, the plaintiff may amend his bill before an appearance by the defendant as a matter of right. But in fairness to the defendant the record should show the manner and extent of the amendment. An appearance in the sense in which the term is here used means to offer some sort of defense, as by demurrer, plea, etc. The defendant may be advised that the plaintiff has no case upon original bill, and indeed such may be the case, and that the bill can not be cured by amendment, unless it introduce a new cause of action; and hence the defendant need not, for that very reason, appear to the suit. It is suggested that when the plaintiff amends his bill, he should do so without destroying its original identity. But while this is suggested as being the proper course, it is not at all necessary that the amendment be made after the form given above. See *ante*, §§ 357, 359, where it is shown that an amendment before appearance may be made in any manner desired by the pleader.

[8] See *ante*, § 359, as to the manner in which an amendment to the

No. 323.

§ 1189. Allowing bill to be amended after answer filed by the defendant.

[*After title of the cause.*]

This day the defendant tendered and filed his answer to the plaintiff's bill of complaint;° whereupon the plaintiff moved the court for leave to amend his said bill, and the court having read and considered said bill and the answer thereto, is of opinion that said amendment is necessary and proper. The plaintiff, therefore, hath leave to amend his said bill, but [*conclude as in No. 322 from the* *].[9]

No. 324.

§ 1190. Allowing bill to be amended by adding new parties, and remanding cause to rules for that purpose.

[*As in No. 322 to the °, and then continue as follows:*]

And thereupon the plaintiff moved the court for leave to amend his bill by making G——— H——— and L——— K——— parties defendant thereto. And it appearing to the court that said G——— H——— and L——— K——— are necessary parties to this suit in order to a full determination of the matters in controversy involved therein, it is therefore adjudged, ordered and decreed that the plaintiff be and he is hereby permitted to amend his said bill so as to make the said G——— H——— and L——— K——— parties defendant thereto. And upon further motion of the plaintiff this cause is hereby remanded to rules, to amend said bill in the manner hereinbefore indicated, and to sue out process summoning said new parties to be made thereto to answer the same.[10]

bill should be made after appearance by the defendant.

[9] See *ante*, § 359.

[10] See *ante*, § 348.

No. 325.

§ 1191. Allowing bill to be amended to conform to the proofs and without prejudice to an injunction issued in the cause.

[*After the style of the cause.*]

This cause came on this day to be heard upon the bill and its exhibits; upon the defendant's answer with general replication thereto; upon the depositions on behalf of the plaintiff taken and filed in the cause, and was argued by counsel. Thereupon the plaintiff asked leave of the court to amend his bill of complaint filed herein at bar, so that the same may conform to the proofs already taken in this cause. It is, therefore, on motion of I——— H——— C———, Esquire,, solicitor for complainant, adjudged, ordered and decreed that the plaintiff have leave to amend now here at bar his said bill of complaint, so that the same will conform to the proofs of adultery already taken herein, and which amendment is shown on a separate paper from said bill, marked "Amendment to Bill," and filed in the papers of this cause. And on motion of the defendant this cause is continued, to enable him to take further proofs in order to meet the allegation of adultery as shown by said bill as amended in the manner and to the extent above named.

And it is further adjudged, ordered and decreed that the proofs already taken herein be retained, and that the amendment made to said bill under this order allowed shall be without prejudice to the writ of injunction already issued and served in this cause.[11]

No. 326.

§ 1192. Allowing the return on a summons to be amended.

[*After the style of the cause.*]

Upon motion of the plaintiff by his counsel, the officer serving the summons to commence this suit hath leave to amend his

[11] This form is adapted from the one found in Green v. Green, 26 Mich. 437. That such an amendment is proper in the courts of the Virginias, see *ante*, § 578.

return thereon so as to conform to the facts attending the service thereof; but such amendment is to be made in such manner as not to mutilate the return as originally indorsed upon said summons.[12]

No. 327.

§ 1193. Allowing an answer to be amended.

[*After the style of the suit.*]

This day the defendant moved the court for leave to amend his answer heretofore filed in this cause, by adding a new paragraph thereto, on page ——— thereof, just after the word "———," and before the word "———," as shown by a separate paper marked "Proposed amendments to answer," and filed his own affidavit in support of said motion. And the court having considered said affidavit, answer and proposed amendment thereto, is of opinion that the said motion ought to be, and the same is hereby, granted, and said answer permitted to be amended in the particular above indicated, which amendment is hereby accordingly made.[13]

No. 328.

§ 1194. Entering motion to quash an attachment, and overruling the same.

[*After the title of the cause.*]

This cause came on this day to be heard upon the affidavit for an attachment filed in the cause; the order of attachment issued therein, and its levy upon the property of the defendant, as shown by the officer's return upon said attachment; upon the motion of the defendant to quash the said attachment, and upon argument of counsel for plaintiff and defendant thereon. Upon consideration of which the court is of opinion to, and doth hereby,* overrule said motion to quash said attachment.[14]

[12] See *ante*, § 32, as to the right to amend the officer's return upon a summons.

[13] See *ante*, §§ 367-371.

[14] See Dunlap v. Dillard, 77 Va. 847.

No. 329.

§ 1195. Entering motion to quash an attachment and sustaining said motion.

[*As in No. 328 to the * and then proceed as follows:*] sustain said motion, and said attachment is hereby quashed.

And upon further motion of the defendant it is ordered that the property attached and seized by the sheriff of this county, under and by virtue of said attachment, be restored to the possession of the defendant. And it is adjudged, ordered and decreed that the defendant do recover of and from the plaintiff his costs in and about the prosecution of his suit in this behalf expended. [*When the jurisdiction of the court depends upon the validity of the attachment, and it is quashed and no further attachment is sued out, the order may continue as follows:*] And the jurisdiction of the court in this case depending upon the maintenance of the attachment, and the plaintiff declining to take out further attachment herein, but relying upon the sufficiency of the attachment heretofore issued in this cause, it is therefore adjudged, ordered and decreed that the plaintiff's bill be and the same is hereby dismissed, but without prejudice to his right to institute another suit for the same cause, if he shall hereafter so desire. It is also adjudged, ordered and decreed that the plaintiff do pay unto the defendant his costs about his defense in this behalf expended, which shall include a statute fee of ——— dollars.[15]

No. 330.

§ 1196. Filing plea in abatement of an attachment.

[*After style of suit.*]

This day the defendant tendered a plea in abatement of the attachment issued in this cause and asked leave to file the same.

[15] See Capehart v. Dowery, 10 W. Va. 130. In this case the motion was made to quash not only the attachment, but also the affidavit upon which the attachment was based; but regularly the motion should go to the attachment alone. If the affidavit be insufficient the motion must prevail.

And thereupon the said plea is hereby filed, to which plea the plaintiff replies generally.[16]

No. 331.

§ 1197. For specific personal property embodying an order of sale under the laws of Virginia.

[*After style of suit.*]

This cause came on this day to be heard upon the bill and its exhibits; upon the answer of the defendant and general replication thereto; upon the affidavit, attachment, levy thereof, and return thereon in this cause; upon the depositions taken and filed herein by the plaintiff and the defendant; and upon the argument of counsel.

Upon consideration of all which it is adjudged, ordered and decreed that the said plaintiff is entitled to the possession of the following described personal property, to-wit: [*here describe the property*]; and that he is entitled to recover against the said C——— D———, the defendant, his damages sustained by reason of the detention of said personal property hereinbefore described, the sum of ——— dollars, and his costs in and about the prosecution of his suit in this behalf expended. It is therefore further adjudged, ordered and decreed that ———, the officer having in his custody the said property, to-wit [*here describe the same*], deliver the same to the said plaintiff, A——— B———, and that he sell the residue of the estate of the said C——— D——— in his hands under and by virtue of said attachment to pay the said sum of ——— dollars damages as aforesaid, and the costs of this suit, including the costs of such sale, which he shall pay out of the proceeds thereof, and the surplus, if any, he shall pay to the said C——— D———.[17]

[16] See *ante*, § 812.

[17] See *ante*, § 824.

No. 332.

§ 1198. Filing petition of third party making claim to the property attached or to some interest therein.

[*After the style of the cause to the * as in No. 317.*]

This day E——— F——— presented to the court his petition, setting forth therein a claim of ownership to the property levied on by virtue of the attachment sued out in this cause, and the court having read and considered said petition, it is adjudged, ordered and decreed that said petition be and the same is hereby filed.[18]

No. 333.

§ 1199. Making up issue on petition of intervention in attachment.

[*After title of the cause.*]

It is hereby ordered that a jury be duly impaneled to try at the bar of this court, "Whether the petitioner, P——— H——— S———, has any lien on the property, or any of it, levied upon by the sheriff of H——— county, under the attachment sued out by W——— H——— S——— in this cause against the estate of L——— R——— D———."[19] And on the trial of said issue before the jury said petitioner shall be treated as the plaintiff and A——— B———, the plaintiff in this suit, as the defendant upon the trial thereof.

No. 334.

§ 1200. Making up issue under the statute of West Virginia on plea in abatement of an attachment.

[*After title of the cause.*]

This cause came on this day to be heard upon the plaintiff's bill and exhibits; the affidavit filed herein for an attachment;

[18] See *ante*, § 825.

[19] This form is taken from Starke v. Scott, 78 Va. 180, 183.

upon the order of attachment issued herein and the levy thereof, and return thereon made by the officer levying the same; upon the plea in abatement of said attachment and the plaintiff's general replication thereto, and was argued by counsel.

Upon consideration of all which it is hereby ordered that a jury be impaneled at the bar of this court, in the manner provided for the trial of an action at law, to try and determine, whether or not, at the time when the affidavit for the order of attachment in this cause issued was made, the defendant had left, or was about to leave, the state, with intent to defraud his creditors. And upon the trial of such issue before the jury, the plaintiff in this suit shall have the affirmative thereof, and the defendant shall hold the relation of defendant thereto, and the trial thereof shall proceed in the manner provided for the trial of issues in actions at law.[20]

No. 335.

§1201. Hearing cause on intervention and garnishment in attachment.

[*After title of the cause.*]

These causes by consent of parties came on this day to be heard together, upon the motion of T——— L——— D——— to abate the attachments sued out in the respective causes. On motion of W——— H——— C———, leave is given him to file his petition in these causes, and the same is hereby accordingly filed in open court. And neither party requiring a jury, the two causes came on to be heard on this ——— day of ———, 19—, on the motion of T——— L——— D———, one of the defendants, and a garnishee summoned in the cause, to abate each of said attachments on the grounds that said attachments were not made returnable as required by the statute, and that they were issued on false suggestions, and without probable cause, and on the petition of W——— H——— C———, and on the answer of T——— L——— D———, the garnishee, and

[20] W. Va. Code, 1913, c. 106, § 19.

on the depositions taken by the parties respectively, and returned in the causes; on consideration thereof the court, being of opinion that the partnership of C——— A——— W——— & Co. does not appear to have any estate or debts due it in the county of Frederick, or to have had any such at the date of such attachments, or any interest in, or claim upon, the property held by the B——— W——— Company, at B———, in said county, doth abate the attachments in each of said causes, and doth adjudge, order and decree that said T——— L——— D——— recover from the complainants his costs, and that the sheriff do restore the attached property to the B——— W——— Company.[21]

No. 336.

§ 1202. Of sale of personal property upon attachment and order of publication.

[*After the style of the cause.*]

This cause came on this day to be heard upon the order of publication duly executed as to the defendant, who is a non-resident and has been regularly proceeded against as such; upon the bill and its exhibits duly filed at rules, the decree *nisi* properly taken thereon and regularly set for hearing by the complainant; upon the affidavit filed herein for an attachment; upon the attachment issued herein, the levy thereof and return thereon made by the officer levying the same; upon the depositions filed in the cause taken on behalf of the plaintiff; and upon the argument of counsel; upon consideration of all which the court is of opinion to and doth find that there is now due and owing from the defendant to the plaintiff on account of the debt in the bill and proceedings mentioned, including the interest thereon from this date,[22] after allowing all payments, credits, and set-offs to which the said defendant is in any wise entitled, the sum of ——— dollars, and that the said plaintiff

[21] The above form is taken from Kern v. Wyatt, 89 Va. 885, 17 S. E. 549.

[22] Cranmer v. McSwords, 26 W. Va. 412.

ought to recover from the said defendant the said sum of ——— dollars, with interest thereon from this date until paid; but this being a proceeding by order of publication and attachment of the property of the said defendant found in this county, without any personal service on the said defendant, and the said defendant not having entered his appearance to this action, the court doth not enter any personal decree against the said defendant; but doth find and doth adjudge, order and decree that the property of the said defendant levied on by virtue of said attachment is liable to the payment of the said sum of ——— dollars, with interest thereon from this date until paid, and the costs of this suit and attachment issued therein; and it further appearing to the satisfaction of the court that there was levied upon, under and by virtue of the said order of attachment herein set out, the following * personal estate: [*here describe the same*], belonging to the said defendant, to satisfy the plaintiff's said debt and claim; and it appearing that the said property is still under the levy of the said attachment, and is liable to the payment of the said debt and claim of the plaintiff, it is therefore adjudged, ordered and decreed that said personal property be sold to pay the plaintiff's said debt and claim and interest thereon from this date, and the costs of this suit.

And it appearing to the satisfaction of the court that the plaintiff has given bond as provided by section 6 of chapter 106 of the Code of West Virginia,[23] it is ordered that the sheriff of this county do sell the said property levied on by the order of attachment as aforesaid, and now in his custody, for cash, after advertising the time, terms and place of such sale, as the law provides for the sale of personal property under execution. And out of the proceeds of such sale he shall pay off and discharge the plaintiff's debt and claim of ——— dollars as aforesaid, with legal interest thereon until paid, and the costs of this

[23] See W. Va. Code, 1913, c. 106, § 6, as to the requirements of this bond and its conditions.

suit, and the surplus thereof, if any, he shall pay over to the said defendant.

No. 337.

§ 1203. Of sale of real estate upon attachment and order of publication.

[*As in No. 336 to the *, and then proceed as follows:*] real estate: [*here describe the same*], belonging to the said defendant, to satisfy the plaintiff's said debt and demand; and it appearing to the satisfaction of the court that the property is still under the levy of the said attachment, and is liable to the payment of the said debt and claim of the plaintiff, and that no personal property belonging to the said defendant was levied upon, it is therefore adjudged, ordered and decreed that unless the said defendant shall pay to the said plaintiff the said sum of $———, interest thereon and the costs of this suit and attachment within ——— days from the rising of this court, the said property, or so much thereof as may be necessary, be sold to pay the plaintiff's said debt and interest thereon from this date, and the costs of this suit and attachment issued therein.

And it is further adjudged, ordered and decreed that for the purpose of making such sale the court doth hereby appoint S——— L——— K——— a special commissioner, who shall advertise the time, terms and place of such sale for four successive weeks in the ———, a weekly newspaper published in this county, and which sale shall be made upon the following terms: [*Here set forth the terms.*]

But before said special commissioner shall make such sale he shall execute a bond with approved security before the clerk of this court in the penalty of ——— dollars, conditioned for the faithful performance of his duties as such special commissioner, and to account for and pay over all money which may come into his hands by virtue of such sale.[24]

[24] The law does not fix the conditions of a bond of a special commissioner, and the order of his appointment, therefore, should prescribe the conditions thereof.

And it is further adjudged, ordered and decreed that before said sale be made, the said plaintiff, or some one for him, shall give bond with sufficient security before the clerk of this court in the penalty of ——— dollars, conditioned that the plaintiff will perform such future order as may be made by the court in this suit in case the said defendant shall hereafter appear and make defense herein within the time prescribed by law; and the said S——— L——— K———, special commissioner, as aforesaid, shall report to this court, at the next term thereof, all real estate he may have sold under this decree, with the name of the purchaser, the sum for which it sold, and the time and place of such sale.[25]

No. 338.

§ 1204. The sale of real estate upon an attachment in a suit wherein the defendant has appeared.

This cause came on this day to be heard upon the bill and its exhibits; upon the answer of the defendant with general replication thereto; upon the affidavit filed herein for an attachment; upon the attachment issued herein, the levy thereof, and return thereon made by the officer levying the same; upon the depositions for the plaintiff and defendant taken and filed in the cause; and upon argument of counsel.†

Upon consideration of all which the court is of opinion and doth so adjudge, order and decree that the plaintiff is entitled to the relief prayed for in his said bill. It is therefore adjudged, ordered and decreed that the defendant do pay to the plaintiff the sum of ——— dollars, the debt in the bill and proceedings mentioned and described with legal interest thereon from this day, until paid, and also the costs of this suit and the costs attendant upon said attachment.

[25] The law requiring the plaintiff to give the bond mentioned in the form given above will be found in the W. Va. Code, 1913, c. 106, § 22.

† It is error to decree a sale of attached realty without giving the defendant his day in which to pay the debt, interest and costs. See *ante*, § 842.

And the court doth find, and so adjudge, order and decree, that the property of the said defendant levied on by virtue of the said attachment issued in this cause is liable to the payment of the said sum of ——— dollars with interest thereon from this date until paid, and the costs of this suit; and it further appearing to the satisfaction of the court* that no personal property was levied on in this cause, but that the following real estate was levied on by virtue of said attachment: [*here describe the same*], belonging to the said defendant, to satisfy the plaintiff's said debt, and it appearing that the said real estate is still under the levy of said attachment, and is liable to the payment of said debt of the said plaintiff, it is therefore adjudged, ordered and decreed that, unless the said defendant shall pay to the said plaintiff the said debt of ——— dollars aforesaid, interest thereon and costs of suit, and of said attachment within ——— days from the rising of this court, the said property, or so much thereof as may be necessary, be sold to pay the plaintiff's said debt, and interest thereon from this date, and the costs aforesaid.

And for the purpose of making such sale the court doth hereby appoint J——— R——— L——— a special commissioner, who shall advertise the time, place and terms of such sale for four successive weeks in the ——— [*here give the name of the newspaper*], a newspaper published in this county, and which sale shall be made upon the following terms: [*here set forth the terms*]. But before said special commissioner shall make such sale he shall execute a bond with approved security before the clerk of this court in the penalty of ——— dollars, conditioned for the faithful performance of his duties as such special commissioner, and to account for and pay over all money which may come into his hands by virtue of such sale; and the said J——— L——— R———, special commissioner as aforesaid, shall report to this court at its next term the real estate he may sell under this order, with the name of the purchaser, the sum for which it sold, and the time and place of

such sale. All of which is adjudged, ordered and decreed accordingly.[26]

No. 339.

§ 1205. For sale of personal estate upon attachment in a suit to which the defendant has appeared.

[*As in No. 338 to the* *, *then proceed as follows:*] that the following personal estate: [*here describe the same*], belonging to the said defendant, was levied on by virtue of said attachment, to satisfy the plaintiff's said debt and demand; and it appearing that the said property is still under the levy of the said attachment, and is liable to the payment of the said debt and claim of the plaintiff, it is therefore adjudged, ordered and decreed that the officer do sell the said property levied on by him as aforesaid, or so much thereof as may be necessary to pay off said debt, interest thereon and costs, at public auction to the highest bidder for cash, after having given notice thereof as if a sale to be made under an execution, and shall apply the proceeds thereof to the payment of the said debt, interest and costs, and the surplus, if any, he shall pay over to the said defendant. All of which is adjudged, ordered and decreed accordingly.

No. 340.

§ 1206. For the sale of property under attachment that is perishable or expensive to keep.

[*After the style of the suit.*]

This day the plaintiff, A——— B———, filed his affidavit in the above-entitled cause, wherefrom it appears that the following property levied upon, seized and attached by J——— C——— D———, sheriff of this county, under and by virtue

[26] See W. Va. Code, 1913, c. 106, §§ 20, 21, from which it will appear that the above form meets the statutory requirements.

Also see, *ante*, § 842.

of an order of attachment issued in this cause, to-wit: [*here describe the property*], is of a perishable nature [*or* is expensive to keep]; it is therefore ordered that the said J——— C——— D———, sheriff of said county, do sell the said property at public auction at such time and place as he shall deem advisable, and that such sheriff give notice of such sale as if a sale of personal property under an execution, and that the sale thereof be made in like manner. It is further ordered that the proceeds of such sale be retained by such officer, and disposed of in the same manner as the property itself, had the same not been sold.[27]

No. 341.

§ 1207. Confirming sale under an attachment.

[*After the style of the cause.*]

This cause came on this day further to be heard upon the former orders and decrees made therein; upon the former proceedings had therein; upon the report of sale of special commissioner J——— C——— L———, heretofore appointed to make sale of the real estate under the order of attachment issued herein and levied thereon, and which report is now filed in this cause. And there being no exceptions to said report, and the court perceiving no just ground of exception thereto, and no good cause being shown for setting aside the sale reported therein, it is therefore adjudged, ordered and decreed that said report and the sale therein mentioned be and the same are hereby ratified and confirmed.

And it appearing from said report that G——— H——— became the purchaser of said real estate sold by said special commissioner under said attachment, that said G——— H——— has complied with the terms of the decree directing said sale by paying ——— dollars in cash, one-third of the pur-

[27] This form is adapted from the W. Va. Code, 1913, c. 106, § 13; Va. Code, 1904, § 2975.

chase money, and has executed his two notes, each in the sum of ——— dollars, with R——— as his security, payable in one and two years, respectively, with interest, for the residue of the purchase money, it is adjudged, ordered and decreed that out of the proceeds of said payment said special commissioner do first pay the costs of this suit, including the costs of said sale, as well also as the costs of suing out the attachment herein and all the proceedings therewith connected, and that the residue thereof, as well as the proceeds of said notes, be applied to the payment of plaintiff's debt as determined by a former decree herein, and that said special commissioner be and he is hereby authorized to do whatever may be necessary to collect said notes, even to the bringing of suit for that purpose. It is further adjudged, ordered and decreed that, when said deferred instalments of purchase money are fully paid, said J——— C——— L——— do make, execute, acknowledge and deliver for record an apt and sufficient deed with covenants of special warranty, conveying the title to said real estate to said G——— H———, for which the said J——— C——— L——— shall be allowed the sum of ——— dollars, to be taxed as a part of the costs of this suit. And it is ordered that a writ of possession do issue for said real estate upon the motion of said G——— H———. All of which is adjudged, ordered and decreed accordingly.[28]

No. 342.

§ 1208. Annulling marriage.

[*After the style of the cause as indicated in No. 315 to the* *.]

This cause came on this day to be heard upon the plaintiff's bill and its exhibits; upon the defendant's answer to said bill with general replication thereto; upon the depositions on behalf of the planitiff and defendant taken and filed in the cause, and

[28] See W. Va. Code, 1913, c. 106, § 21, from the provisions of which the above form is constructed.

was argued by counsel. Upon consideration of which the court is of opinion that the plaintiff is entitled to the relief prayed for in his said bill.* It is therefore adjudged, ordered and decreed that the marriage heretofore celebrated between the said A——— B——— and C——— B——— be, and the same is hereby declared to be null and void and of no effect whatever, and the same shall be taken, treated and held as if it had never been entered into between the said parties.[29]

No. 343.

§ 1209. Tendering answer and asking leave to file the same.

[*After the style of the cause.*]

This day the defendant, C——— D———, tendered his separate answer to the plaintiff's bill and asked leave to file the same, which is hereby accordingly done.[30]

No. 344.

§ 1210. Filing answer and noting exceptions thereto.

[*After the style of the cause.*]

This day the defendant, C——— D———, filed his answer to the plaintiff's bill. Whereupon the plaintiff excepted to the said answer, filing his exceptions thereto in writing, which are endorsed on the said answer [*or* which exceptions are written on a separate paper, marked "Exceptions of A——— B——— to the answer of C——— D———"] and which exceptions are here set down for argument.[31]

[29] See Waymire v. Jetmore, 22 Ohio St. 271.

[30] Inasmuch as a defendant may file an answer as matter of right, the above form seems unnecessary. Still it is matter of common practice to tender an answer, and ask permission of the court to file the same. Hence, the reason for the preparation of the above form.

[31] See *ante*, § 439.

No. 345.

§ 1211. Referring answer to a commissioner to expunge scandalous matter.

[*After the style of the cause.*]

The court doth hereby refer the answer filed herein by the defendant, R——— B———, to the plaintiff's bill, to G——— H———, one of the commissioners of this court, for the purpose of expunging the impertinent or scandalous matter therein contained, and doth order that the said defendant do pay the costs of executing this order. And the said commissioner is hereby directed forthwith to report to the court such matters contained in the said answer as shall be deemed by him impertinent and scandalous.[32]

No. 346.

§ 1212. Adjudging answer insufficient and directing further answer to be filed.

[*After the style of the cause.*]

The exceptions to the answer of C——— D——— filed in this cause being argued and considered by the court, said exceptions are hereby sustained, and the said answer is hereby adjudged insufficient. It is therefore ordered that the defendant answer the plaintiff's bill more fully and sufficiently; and that he pay the plaintiff his costs occasioned by such insufficient answer.[33]

No. 347.

§ 1213. Filing answer and general replication thereto.

[*After the style of the suit.*]

This day the defendant filed his answer to the plaintiff's bill to which the plaintiff replied generally.[34]

[32] Sands, Suit in Equity (2nd Ed.), from which this form is substantially taken.

[33] See Sands, Suit in Eq. (2nd Ed.), 596.

[34] This is the proper way in which to bring the answer into the

No. 348.

§ 1214. Granting permission to guardian to submit to arbitration a matter relating to his ward's estate.

This day A——— B———, as guardian of C——— D———, an infant under twenty-one years of age, presented to the court his petition praying that he be permitted to submit to arbitration the matters in controversy in said petition mentioned and described touching the estate of his said ward. And the facts upon which the said petitioner seeks the permission of the court to submit such matters to arbitration being stated in said petition, and it appearing to the court that said petition is filed in good faith, it is hereby ordered that said petitioner be and he is hereby permitted to submit said matters to arbitration.[35]

No. 349.

§ 1215. Submitting cause to arbitration and making the same a rule of court.

A——— B———
v.
C——— D———. } In Chancery.

Upon motion of the parties to this suit by their counsel, and upon reading the articles of agreement signed by the said parties, stipulating for a submission of said cause to arbitration, and having inspected the affidavits of ——— and ———, filed herein, proving the due execution of the said articles of agreement and submission; and upon hearing counsel for the respective parties and reading the said affidavits filed herein; it is adjudged, ordered and decreed that the said agreement stipu-

record of the cause. If upon being filed it is regarded as insufficient or otherwise objectionable, the proper course is to except to it; but if it be not objectionable, it should be replied to. However, if the answer is entirely insufficient, objection to its being filed may be made and the same object attained as if the answer were formerly exceepted to.

[35] This form is adapted for use under the statute of West Virginia, Code, c. 108, § 5, and Va. Code, 1904, § 3010.

lating for the submission of said cause to arbitration be filed herein and made part of the record in this cause; that the same be made a rule of court, to be observed and performed by all the parties thereto, according to the tenor and true meaning thereof.[36]

No. 350.

§ 1216. Filing award of arbitrators, making allowances to them and directing summons to show cause against said report.

[*After the style of the cause.*]

This day came the parties to this cause by their respective counsel and presented to the court the award made by the arbitrators [*here name said arbitrators*], selected by said parties under an order heretofore entered in said cause submitting the same to arbitration, and asked leave to file said award, which is accordingly done. And thereupon the arbitrators filed their affidavits in this cause, from which it appears that a reasonable compensation to each of said arbitrators for their services while acting as such arbitrators would be the sum of ——— dollars; and it is therefore ordered that each of said arbitrators be, and he is, hereby allowed the sum of ——— dollars for his said services, to be taxed as part of the costs of this suit.

It is further ordered that the clerk of this court do issue a summons to be served on all the parties to this suit, returnable here on the first day of the next term of this court to show cause, if any they can, why the said award should not be entered up as the decree of this court in this cause. All of which is adjudged, ordered and decreed accordingly.[37]

[36] Seton on Decrees, 210.

[37] This form is founded upon the provisions of statute, W. Va. Code, 1913, c. 108, § 3; Va. Code, 1904, § 3008.

No. 351.

§ 1217. Entering up award as the decree of the court.

[*After the style of the suit.*]

This day came the parties to this suit by their respective counsel, and it appearing to the court that the summons to show cause why the award made herein should not be entered as the decree of the court, heretofore directed, was issued and properly served, and with its return is now filed in the papers of this cause; and this cause now comes on to be heard upon the bill and its exhibits; upon the former orders and decrees made and entered herein; upon the said award, and the said summons duly issued and served; and was argued by counsel. And it appearing from said award that the defendant, C——— D———, is required to pay to the plaintiff, A——— B———, the sum of ——— dollars, and it further appearing that no good cause is shown against the entry of such award as the decree of this court, it is therefore adjudged, ordered and decreed that the said A——— B——— do recover of and from the defendant, C——— D———, the sum of ——— dollars, with interest thereon from this date until paid and the costs of this suit, including the costs of the arbitration made in this cause.[38]

No. 352.

§ 1218. Of attachment for contempt of court.

The State of West Virginia,
at the relation of A——— B———
v.
D——— O——— K———. } Upon Attachment.

The said defendant, D——— O——— K———, not showing nor asking to be allowed to show any further or other cause why

[38] See Davis v. Crews, 1 Gratt. (Va.) 407; also Winch and Hinman, Order Bk. Ent., 197 *et seq.*

he should not be attached or otherwise proceeded against for his failure to comply with the order of this court made on the ——— day of ———, 19—, and with the order of the circuit court of O——— county, mentioned in said rule, it is ordered that the sheriff of said county do attach the body of the said D——— O——— K———, and keep him in safe custody in the jail of O——— county aforesaid until the further order of this court [*or for the continuous period of ——— days, beginning with this day or until the further order of this court*].[39]

No. 353.

§ 1219. Finding against intervener in an attachment suit.

[*After the title of the cause.*]

This cause came on this day to be heard upon the former orders and decrees made and entered herein; upon the former proceedings had in this cause; upon the verdict of the jury heretofore entered in this cause; upon the motion of C——— M——— J———, the intervener herein to set aside said verdict and award him a new trial; upon the bills of exceptions taken to the rulings and opinions of the court made and rendered upon the trial before the jury of the issue heretofore directed

[39] A contempt of court is in the nature of a criminal offense, and the proceeding for its punishment, is in its character a criminal proceeding. Before the attachment for the contempt issues the proceedings are to be entitled in the names of the parties to the suit, but afterwards in the name of the state. Ruhl v. Ruhl, 24 W. Va. 281, 283.

After the return of a rule to show cause why a party should not be attached, the court should entitle the proceedings in the name of the state, and make it a separate and distinct proceeding from the chancery cause, and enter a separate order in relation thereto; and the order should not be entered on the chancery side of the court, but on the law side thereof. Hence, the form above given, though in a chancery suit, must be entered on the law side of the court. Ruhl v. Ruhl, *supra*.

But, in a proper case, a contempt may also be punished in the court in which the contempt occurs and by an order entered in the cause out of which the contempt grows. See *ante*, §§ 754, 755, and cases cited.

and tried in this cause;[40] upon all the papers heretofore filed and read therein; and upon the argument of counsel. And it appearing from the said verdict rendered by the jury impanneled in this cause that the claim of the said petitioner is not sustained, it is therefore adjudged, ordered and decreed that the said motion be, and the same is, hereby overruled, and that the said petitioner, C——— M——— J———, hath no title to, lien upon, or interest in, the funds, debts, and effects attached in this cause; and it is further adjudged, ordered and decreed that the petition of the said C——— M——— J——— be, and the same is, hereby dismissed at the costs of the said petitioner.

No. 354.

§ 1220. For sale of property attached when debt is not due.

[*After the style of the suit, and then as in No. 338 to the †, and then proceed as follows:*] And the court doth find and so adjudge, order and decree, that the property of the said defendant levied on by virtue of said attachment issued in this cause is liable to the payment of the plaintiff's debt in the bill and proceedings in this cause mentioned and described, and the costs of this suit; and it further appearing to the court that this suit was brought upon a debt not due and payable until the ——— day of ———, 19—, at which time the said debt, with its then accumulated interest, will amount to the sum of ——— dollars, it is therefore adjudged, ordered and decreed that said plaintiff, A——— B———, do recover of and from the said defendant, C——— D———, the said sum of ——— dollars, not to be paid, however, until the said ——— day of ———, 19—, and from which time the same shall draw legal interest until paid; and it is further adjudged, ordered and decreed that said plaintiff do recover his costs in and about the prosecution of his suit, and of said attachment and proceedings thereon, in this behalf expended and incurred.

[40] See Joslyn v. State Bank, 86 Va. 287, 10 S. E. 166.

And it is further adjudged, ordered and decreed that the said C——— D——— do pay the costs of this suit to be taxed by the clerk of this court, within ——— days from the rising of this court; and it is further adjudged, ordered and decreed that the said C——— D——— do pay the said sum of ——— dollars with the interest thereon accrued on the ——— day of ———, 19—, the time when the same shall be due and payable; and in default of the payment of the said costs and the said debt at the respective times herein provided, that then sale be made of the property attached, and fully described in the officer's return upon the order of attachment issued herein, and if sale be made in order to pay off and discharge the costs of this suit, that said sale be made for cash as to so much of the purchase money as may be necessary to pay the costs, as well as the costs incident to such sale; and that as to the residue the same be on a credit as to one-half of said residue corresponding with the time said debt shall have to run until it becomes due and payable; that is, on a credit extending to the ——— day of ——— 19—, and as to the residue of said purchase money, the same shall be on a credit of ——— from the time of sale, the purchaser giving his notes bearing interest from the time of sale, with sufficient surety, and the said special commissioner hereinafter appointed shall retain the legal title as a further security; but if the said C——— D——— shall pay off and discharge the costs of this suit, that the said special commissioner is hereby directed to make no sale of said real estate until after the said ——— day of ———, 19—, the time when the said debt shall become due and payable; and if, when the same shall become due and payable, the said C——— D——— shall not pay the same within ——— days thereafter, then said special commissioner shall sell the said property, or so much thereof as may be necessary, to pay off and discharge said debt and the costs of sale upon the following terms: [*here prescribe the terms*]; but before making such sale, said commissioner shall advertise the time, terms and place thereof in [*here prescribe the manner and time of notice and place of sale, and continue in the usual manner of any ordinary decree of sale*].

No. 355.

§ 1221. Against garnishee in an attachment suit.

[*After the style of the cause.*]

This cause came on this day to be heard upon the order of publication duly executed as to the principal defendant, C——— D———, a nonresident of this state; upon the order of attachment duly issued herein against the property of said defendant and duly served upon the defendant E——— F——— by way of garnishment against the said E——— F———; upon the separate answer of the said E——— F——— and general replication to said answer; upon the depositions on behalf of the plaintiff taken and filed in the cause; and the said defendant C——— D———, not further appearing, the court having considered the plaintiff's bill and the proof taken in support thereof, as well also as the matters contained in said answer, and said depositions, doth ascertain that there is due and owing to the plaintiff from the defendant C——— D——— on the demand sued on in this cause, including interest thereon to date, the sum of ——— dollars, for the payment of which the attachment sued out in this cause creates a valid and binding lien upon the estate of the said C——— D——— in the hands of the said E——— F———.

And it appearing from the answer of the said E——— F——— that, at the time the said attachment was issued in this case and the suggestion made thereon was served upon the said E——— F———, the said E——— F——— was indebted to the said C——— D——— in an amount sufficient to pay the said sum of ——— dollars, with legal interest thereon until paid and the costs of this suit; it is therefore adjudged, ordered and decreed that said E——— F——— do pay unto said A——— B——— the said sum of ——— dollars, with interest thereon from this date till paid, and the costs of this suit, including the costs of said attachment and suggestion thereon; and when the same shall have been paid by the said E——— F——— it shall constitute a credit to that extent upon the indebtedness of said E——— F——— to said C——— D———, and be taken, treated and

applied as a payment of that sum by the said E——— F——— upon his indebtedness to the said C——— D———; and when the said sum of ——— dollars shall be so paid, the same shall operate as a payment or extinguishment of the said debt of ——— dollars due and owing from the said C——— D——— to the said A——— B———. All of which is adjudged, ordered and decreed accordingly.[41]

No. 356.

§ 1222. Overruling defendant's exceptions to an attachment bond.

[*After the style of the suit.*]

The exceptions filed by the defendant to the attachment bond given in this cause, having been argued by counsel and considered by the court, are hereby overruled, and said bond adjudged to be sufficient.[42]

No. 357.

§ 1223. Sustaining defendant's exception to an attachment bond.

[*After the title to the cause.*]

Upon motion of the defendant the exceptions taken to the attachment bond, given by the plaintiff in this cause are hereby set down for argument. And the matters of law arising upon the said exceptions being argued by counsel and considered by the court, the court is opinion to and doth hereby sustain said exceptions. It is therefore adjudged, ordered and decreed that the said bond be and the same is hereby adjudged insufficient, and the said plaintiff is hereby required to give a new and sufficient bond on or before the ——— day of ———, 19—, to be approved by the court, and upon the plaintiff's failure so to do, the

[41] See *ante*, § 839.

[42] See W. Va. Code, 1913, c. 106, § 6.

officer having in his custody the property herein attached shall return the same to the possession of the defendant.[43]

No. 358.

§ 1224. Dismissing bill without prejudice.

[*After style of cause.*]

This cause came on this day to be heard upon the plaintiff's bill and exhibits; upon the defendant's demurrer filed thereto; and upon the argument of counsel. Upon consideration of which the court is of opinion to and doth hereby sustain said demurrer, the court being further of opinion that the bill presents a case of which a court of equity can not take cognizance, but that the same is proper for the jurisdiction of a court of law.

It is therefore adjudged, ordered and decreed that the plaintiff's bill be and the same is hereby dismissed, but without prejudice to his right to bring an action at law upon the demand herein sued on if he shall so desire. It is also ordered that the plaintiff do pay unto the defendant his costs about his defense in this behalf expended.[44]

No. 359.

§ 1225. Sustaining exceptions to forthcoming bond in attachment suit and requiring officer to obtain a good bond.

[*After the style of the suit.*]

Upon motion of the plaintiff, the exceptions heretofore endorsed to the replevy bond taken by the officer levying the attachment sued out in this cause are hereby set down for argu-

[43] The above form is adapted for use in cases arising under the W. Va. Code, 1913, c. 106, § 6; likewise form No. 356.

[44] When a suit in equity is dismissed without a hearing upon the merits presented by the bill, the dismissal should be without prejudice to the plaintiff's right to bring another suit for the same cause. *Ante*, § 400.

ment. And the said exceptions being argued and considered by the court, are hereby sustained and the said bond adjudged to be insufficient. It is therefore adjudged, ordered and decreed that the said officer, J. M. C., sheriff of this county, be and he is hereby required on or before the ——— day of ———, 19—, to file in the papers of this cause a good bond, with sufficient security to be approved by the court; and upon the failure of such officer so to do, the sureties upon his official bond shall be liable to the plaintiff as and for a breach of the same, should the said plaintiff sustain any loss or damage in consequence of the insufficiency of said replevy bond taken by the said officer levying the attachment sued out herein.[45]

No. 360.

§ 1226. Cancelling an instrument as a cloud upon title to real estate.

[*After the style of the suit and proper recitals as the papers and proceedings in the cause may require, proceed as follows:*] Upon consideration of which the court is of opinion that the plaintiff is entitled to the relief prayed for in his said bill. It is therefore adjudged, ordered and decreed that the deed of conveyance [*or whatever the instrument may be*] from the defendants D——— F——— and C——— F——— to the defendant J——— K———, bearing date on the ——— day of ———, 19—, of the tract or parcel of land in the bill and proceedings in this cause mentioned and described, and recorded in the office of the clerk of the county court of ——— county, and state of ———, in Deed Book No. ———, p.———, be and the same is hereby set aside and declared to be null and void, as against the complainant.[46] [*Conclude by decreeing costs against defendants.*]

[45] The above form is adapted for use under the statutes of W. Va., Code, 1913, c. 106, § 11, and Va. Code, 1904, § 2973.

[46] See *ante*, § 622; Puterbaugh, Ch. Pl. and Pr. (3rd Ed.), 664.

No. 361.

§ 1227. Cancellation or rescission of an instrument on the ground of fraud.

[*After the style of the cause and recital as indicated in No. 318 to the* *.]

Upon consideration of all which the court is of opinion, and doth so adjudge, order and decree, that the contract [*or* note, deed *or whatever the writing may be*], in the bill and proceedings mentioned and described, bearing date on the ——— day of ———, 19—, signed by [*here name the party or parties*] was obtained and procured to be made by misrepresentation and fraud, and ought to be cancelled and rescinded; and it further appearing to the court that the plaintiff A——— B——— has paid into this court the sum of ——— dollars, the amount received by said A——— B——— under said contract, and which is now in the hands of the general receiver of this court as the money and property of the defendant C——— D———, and which the said receiver is ready to pay over to the said C——— D———; it is therefore adjudged, ordered and decreed that the said contract bearing date and signed as aforesaid be and the same is hereby cancelled and rescinded and held for naught, and to have no more force or effect than if the same had never been entered into by the said parties who signed the same. And it is further adjudged, ordered and decreed that L——— K———, the general receiver of this court, do at once, pay unto said defendant, C——— D———, the said sum of ——— dollars.

† And it is further adjudged, ordered and decreed that the said C——— D——— do pay unto said A——— B———, his costs in and about the prosecution of his suit in this behalf expended, which shall include a statute fee of ——— dollars.[47]

[47] See Winch and Hinman, O. B. Ent., 109.

No. 362.

§ 1228. Cancellation or rescission of an instrument on the ground of infancy.

[*After the style of the cause, and recital as indicated in No. 318 to the* *.]

Upon consideration of all which the court is of opinion and doth so adjudge, order and decree that the deed [*or other* instrument *as the case may be*] in the bill and proceedings mentioned and described, bearing date on the ——— day of———, 19—, executed by the plaintiff A——— B———, to the defendant C——— D———, conveying the real estate therein described, signed by said A——— B——— to said C——— D———, was made and delivered by said A——— B——— to said C——— D——— while the said A——— B——— was an infant under the age of twenty-one years; and it further appearing to the court that said A——— B——— received as the consideration of said deed the sum of ——— dollars, but which he has expended, so that nothing thereof now remains in the possession or ownership of the said A——— B———, it is therefore adjudged, ordered and decreed that the said deed bearing date on the ——— day of ———, 19—, executed by said A——— B——— to said C——— D———, conveying to him, the said C——— D———, ——— acres of land, be and the same is hereby cancelled and annulled, and to be taken and treated as if the said deed had not been executed.

And as a further assurance of title to the said land in said deed described, and to remove the cloud created upon such title by said deed, it is further adjudged, ordered and decreed that said C——— D——— do execute, acknowledge and deliver for record a quit-claim deed to said land in said deed described within ——— days from the adjournment of this court, and in default thereof, that such quit-claim deed be executed, acknowledged and delivered for record by E——— F———, who is hereby appointed a special commissioner for that purpose,

and hereby duly authorized and empowered thereunto, for which the said E——— F——— shall be allowed the sum of ——— dollars to be taxed as a part of the costs of this suit.

[*Conclude as in No. 361 from the* †.][48]

No. 363.

§ 1229. Cancellation or rescission of a writing because of the plaintiff's insanity.

[*After the style of the suit and proper recitals, proceed as follows:*]

And it appearing to the court that, at the time when the contract in the bill and proceedings in this cause mentioned and described, between the plaintiff A——— B——— and the defendant C——— D———, bearing date on the ———day of ———, 19—, was executed, the said plaintiff was insane and therefore incapable of entering into such contract, it is therefore adjudged, ordered and decreed that such contract between the said A——— B——— and C——— D———, bearing date as aforesaid, be and the same is hereby set aside and declared to be null and void, and the said C——— D——— is hereby directed and required to deliver up said contract to the clerk of this court to be by him cancelled.

And it is further adjudged, ordered and decreed that the said defendant do pay unto the said plaintiff his costs by him about the prosecution of his suit in this behalf expended and incurred.[49]

[48] See extended note to § 939, where the law authorizing the above form will be found, read in connection with the doctrine found in § 55. (See Decrees.)

[49] This form is based upon the doctrine and principles announced in Hiett v. Shull, 36 W. Va. 563, 15 S. E. 146; Hogg, Eq. Princ., § 55.

No. 364.

§ 1230. Authorizing sale of church property.

Ex parte, A——— B———, C——— D———, E——— F———, G——— H——— and I——— J———, the Board of Trustees of the P——— Church of ———, in the County of ———, and State of———.

This cause came on this day to be heard upon the petition heretofore filed in this court, of the said A——— B———. C——— D———, E——— F———, G——— H——— and I——— J———, constituting and composing the board of trustees of the P———church of———, in the county of———, and state of ———; upon an order of publication stating the filing of such petition and the object thereof, duly posted on the front door of the court house of this county, and at a conspicuous place on the premises described in said petition; upon such order of publication duly published in ———, a newspaper published in said county, for the period of ———, as heretofore by order of this court directed; upon the proof taken herein showing, among other things, that a majority of the members of said church desire a sale of said property in said petition mentioned and described; and upon argument of counsel herein.

And it appearing to the court that the said petitioners have shown a case wherein a sale of real estate is proper, and the court being of opinion that the rights of others will not be violated by a sale of said property, it is therefore adjudged, ordered and decreed that said petitioners be and they are hereby authorized and empowered to make sale of the real estate in the said petition mentioned and described, either at public or private sale, whichever in the opinion of said petitioners will best promote the interests of those concerned, and upon the following terms: one-third of the purchase money cash in hand and the residue upon a credit of one and two years respectively, the purchaser giving bond with good security for the deferred instalments of purchase money. And if the sale be at public auction, the same shall be made only after publication

of notice thereof for four successive weeks in some newspaper published in this county, of the time, terms and place thereof.

But before said petitioners shall make sale of said land they shall enter into bond before the clerk of this court with approved security in the penalty of ——— dollars, conditioned for the faithful discharge of their duties in the premises, and to account for and invest the proceeds derived from such sale as the court shall hereafter determine, and what said petitioners shall do under this decree they shall report to a future term of this court.[50]

No. 364*a*.

§ 1231. Overruling demurrer to bill and giving rule to answer.

[*After the style of the cause.*]

This day the defendant filed a demurrer to the plaintiff's bill, which demurrer is set down for argument; and the matters of law arising thereon being argued by counsel and considered by the court, said demurrer is hereby * overruled. And thereupon a rule is hereby given the defendant to answer said bill on or before the ——— day of ———, 19—.[51]

No. 364*b*.

§ 1232. Sustaining demurrer to bill and remanding cause to rules with leave to amend.

[*After the style of the cause as in No. 364a, and to the* *:] sustained, and said bill adjudged not to be sufficient in law. Upon motion of the plaintiff this cause is remanded to rules with leave to make any and all proper and germane amendments to said bill, but at the costs of the said plaintiff, and to be taxed accordingly by the clerk of this court.[52]

[50] This form is designed for use under the statute of West Virginia, Code, c. 57, § 9.

[51] See *ante*, § 338.

[52] See *ante*, § 338.

No. 365.

§ 1233. Suggesting nonresidence of plaintiff and demanding security for costs.

[*After the style of the cause.*]

This day the defendant suggested the nonresidence of the plaintiff and demanded security for costs.[53]

No. 366.

§ 1234. Of divorce a mensa et thoro, where the defendant has not appeared.

[*After the style of the suit.*]

This cause came on this day to be heard upon the process duly executed upon the defendant; upon the plaintiff's bill with its exhibits regularly filed at rules; the decree *nisi* properly entered thereon, and the cause regularly set for hearing by the complainant; upon the depositions on behalf of the plaintiff taken upon due notice and filed herein; and upon the argument of counsel on the part of the plaintiff.*

Upon consideration of all which the court is of opinion that the plaintiff is entitled to the relief prayed for in his [*or* her] said bill. It is therefore adjudged, ordered and decreed that the plaintiff, A——— B———, and the defendant, C——— D———. be and they are hereby divorced from each other from bed and board. It is further adjudged, ordered and decreed that the said A——— B——— do pay the costs of this suit, but without the taxation of any statute fee herein.

No. 367.

§ 1235. Of divorce a mensa et thoro for alimony, where the defendant has appeared.

[*After the style of the suit.*]

This cause came on this day to be heard upon the plaintiff's bill and its exhibits; upon the answer of the defendant thereto

[53] W. Va. Code, 1913, c. 138, § 2.

and general replication to said answer; upon the depositions on behalf of the plaintiff and defendant taken and filed in the cause; and upon the argument of counsel on the part of the plaintiff and defendant.*

Upon consideration of all which the court is of opinion that the plaintiff, A——— B———, is entitled to the relief prayed for in her said bill. It is therefore adjudged, ordered and decreed that the said plaintiff and said defendant be and they are hereby divorced from each other from bed and board.

And it is further adjudged, ordered and decreed that the said C——— B——— do pay unto the said A——— B——— as alimony until the further order of this court, or until they, the said plaintiff and defendant, shall be reconciled to, or shall cohabit with, each other again as husband and wife, but not in any event for a greater period of time than their joint lives, for the support and maintenance of the said A——— B———, the annual sum of ——— dollars, payable in quarterly instalments of ——— dollars each, on or before the 1st days of April, July and October, and the 31st day of December, in each year, the payment of said instalments to commence on the 1st day of ———, in the year 19—, and to continue thereafter during the period hereinbefore designated; but the court hereby expressly reserves the power at any time in the future to modify and change the said annual sum and the terms of its payment.

[*Conclude by decreeing costs against the defendant, as indicated in No. 361 from the* †.][54]

[54] See *ante*, § 928, note, and § 45. (See Decrees.)

It is error to decree alimony for the life of the plaintiff. It can not be for a greater period than the joint lives of the parties. Henrie v. Henrie, 71 W. Va. 131, 76 S. E. 837.

It is error to enter a decree for alimony without reserving the power to change it. Sperry v. Sperry, 80 W. Va. 142, 92 S. E. 574.

No. 368.

§ 1236. Of divorce a vinculo matrimonii and awarding custody of children.

[*After style of suit and proper recitals, as indicated in Nos. 366, 367, to the *, as the case may require.*]

Upon consideration of which the court is of opinion that the plaintiff is entitled to the relief prayed for in his said bill. It is therefore adjudged, ordered and decreed that the marriage heretofore celebrated between the plaintiff, A——— B———, and the defendant, C——— B———, be and the same is hereby dissolved, and that the said A——— B——— and C——— B——— be and they are hereby divorced from each other from the bonds of matrimony.*

And it appearing to the court that there is issue of said marriage two children, to-wit, *James,* aged *nine* years, and *Jane,* aged *seven* years, and it further appearing that their father, said A——— B———, is a suitable and proper person to have the care and custody of said children, it is therefore adjudged, ordered and decreed that the care and custody of said *James* B——— and said *Jane* B———, children of the said A——— B——— and C——— B———, be and the same are hereby awarded to the said A——— B———.

And it is further adjudged, ordered and decreed that the said A——— B——— do pay the costs of this suit, but the clerk will tax no statute fee therein.[55]

[55] See 7 Enc. Forms, 66 *et seq*; Sands, Suit in Eq., 584, 585.

In all cases of divorce *a vinculo matrimonii*, if the court, in the exercise of its discretion, places any greater time limit upon remarriage of the parties than the six-month limit prescribed by the statute, of course the decree should so state. But there would seem to be no necessity for mentioning the six-month limit in the decree, in order to give validity either to the decree or to the restriction, since the restriction is imposed by law, regardless of the decree. However, a reference in the decree to the restriction would be expedient as a reminder and warning to the parties, and might thus prevent a violation of the statute. See W. Va. Code, 1916, c. 64, § 14.

No. 369.

§ 1237. Of divorce a vinculo matrimonii and for alimony.

[*After the style of the suit and proper recitals, as indicated in Nos. 366, 367, as the case may require, and then as in No. 368 to the* *.]

And the court, having examined the pleadings and evidence in this cause, and having duly considered the same, is of opinion that the plaintiff is entitled to alimony, and that the annual sum of —— dollars would, under the circumstances of this case, be a reasonable amount for the support and maintenance of the said A—— B——. It is therefore adjudged, ordered and decreed that the said C—— B—— do pay unto the said A—— B——, as alimony during the joint lives of the said A—— B—— and C—— B——, for the support and maintenance of the said A—— B——, the said annual sum of —— dollars, payable in instalments of —— dollars each on the 1st day of January and July in each year during the period of the joint lives of said A—— B—— and C—— B——, the payment of said instalments to commence on the —— day of ——, 19—, and to continue during the period above described, but subject to the express power hereby reserved by the court at any time in the future to change the amount of said alimony or alter the terms of its payment.†

[*Conclude as in No. 361 from the* *.] [56]

No. 370.

§ 1238. Of a divorce a vinculo matrimonii after a former divorce a mensa et thoro.

[*After the style of the suit.*]

This cause came on this day to be heard upon the papers formerly read and the proceedings had therein, upon the decree of divorce *a mensa et thoro* heretofore entered therein, upon the petition (or supplemental bill) of the plaintiff thereafter

[56] See references under §§ 1235, 1236.

filed therein praying for a decree of divorce *a vinculo matrimonii* in pursuance of section 13 of chapter 64 of the Code, upon process (or notice) duly served upon the defendant requiring him (or her) to answer said petition (or bill), upon the cause regularly matured for a hearing upon said petition (or bill), and was argued by counsel. On consideration of which, it appearing to the court, as established by the decree heretofore rendered in this cause, that the defendant had abandoned the said plaintiff, and two years having elapsed since the institution of this suit, and it appearing from satisfactory evidence taken and filed herein, that the said parties have not been reconciled to each other since the rendition of the former decree herein, it is adjudged, ordered and decreed that the bonds of matrimony heretofore celebrated and existing between the plaintiff, A——— B———, and the defendant, C——— B———, be and they are hereby dissolved, and the said parties are forever divorced from each other.[57]

No. 371.

§ 1239. Of divorce granted on answer in nature of cross-bill setting up claim to affirmative relief.

[*After style of suit.*]

This cause came on this day to be heard upon the plaintiff's bill and its exhibits; upon the answer of the defendant to the plaintiff's bill and also in the nature of a cross-bill setting up a claim to affirmative relief; upon general replication to said answer, and the plaintiff's special reply in writing to so much of said answer as is in the nature of a cross-bill setting up a claim to affirmative relief; upon the depositions on behalf of the plaintiff and defendant taken and filed in the cause; and upon the argument of counsel.

Upon consideration of all which the court is of opinion that the plaintiff is not entitled to the relief prayed for in her said

[57] The foregoing form is taken from Sands, Suit in Equity (2nd Ed.), 585, with such changes as to adapt it to the statute of West Virginia, Code, c. 64, § 13. Chapman v. Chapman, 70 W. Va. 522, 74 S. E. 661; Dixon v. Dixon, 73 W. Va. 7, 79 S. E. 1016. After a decree of divorce *a mensa et thoro* the cause should be retained on the docket for further proceedings. *Idem.* The form as found in Sands may be used without change in the state of Virginia; likewise the above form, by changing the time that has elapsed as mentioned in the above form from two to three years. See *ante*, note 55.

bill, and that the same should be dismissed. It is therefore adjudged, ordered and decreed that the plaintiff's bill be and the same is hereby dismissed. * But it does appear to the court that the defendant is entitled to affirmative relief against the plaintiff as prayed for in his said answer. It is, therefore, adjudged, ordered and decreed that, upon the case made by the said defendant against the said plaintiff upon the said answer in the nature of a cross-bill setting up a claim to affirmative relief, the marriage heretofore celebrated between the said defendant, C——— B———, and the said plaintiff, A——— B———, be and the same is hereby dissolved, and the said A——— B——— and C——— B——— are hereby divorced from the bonds of matrimony heretofore existing between them.

And the court being of opinion that under all the circumstances of this case the defendant ought to recover his costs, it is therefore adjudged, ordered and decreed that A——— B——— do pay unto the said C——— B——— his costs about his defense in this behalf expended, as well also as his costs about the prosecution of his case made in his answer in the nature of a cross-bill setting up a claim to affirmative relief, including a statute fee of ——— dollars.[58]

No. 372.

§ 1240. Refusing a divorce to the plaintiff, and to the defendant on an answer in the nature of a cross-bill.

[*After style of suit and as in No. 371 to the* *, *and then continue as follows:*]

And the court is of opinion that the defendant is not entitled to affirmative relief against the plaintiff as prayed for in his [*or* her] said answer. It is therefore adjudged, ordered and decreed that, so far as said answer in the nature of a cross-

[58] See 7 Enc. Forms, 76; *ante*, note 55.

bill sets up any claim to affirmative relief against the said plaintiff, it be and the same is hereby dismissed.

And it is further adjudged, ordered and decreed that each party to this suit do pay his own costs.[59]

No. 373.

§ 1241. Directing payment of temporary alimony to the plaintiff in term time.

[*After the style of the suit.*]

This day the plaintiff moved the court to require the defendant to pay to her a reasonable sum of money for her support and maintenance during the pendency of this suit and to enable her to carry on the same, and in support of said motion read her bill filed herein, which is verified by her own affidavit, and in further support thereof filed the affidavits of J. C., R. P. and S. J.; and the defendant in opposition to said motion filed his own affidavit and those of R. D. and J. K. Upon consideration of which the court doth hereby sustain said motion, and doth adjudge, order and decree that the defendant, C——— B———, do pay unto the plaintiff, A——— B———, within ——— days from this date, the sum of ——— dollars for the purpose named in the said motion.[60]

No. 374.

§ 1242. Directing payment of temporary alimony to the defendant in vacation.

This day C——— B——— by her solicitor presented her bill in this cause and her own affidavit and those of R——— W——— and I——— M——— and moved the undersigned, judge of the circuit court of ——— county and state of ———, in the vacation of the said court, to require the plaintiff in the

[59] See 7 Enc. Forms, 76, 77.

[60] See Hogg, Eq. Princ., § 440, as to the matter of the allowance of alimony *pendente lite*.

case of A——— B——— against C——— B———, pending in said court to obtain a divorce from the said C——— B———, to pay the said C——— B——— a reasonable sum of money for the support and maintenance of said C——— B——— during the pendency of said suit and to enable her properly to defend the same.

And [it appearing that the said A——— B——— has had due notice of this motion, and] the said judge having read and considered said affidavits, it is therefore adjudged, ordered and decreed that said A——— B——— do pay unto said C——— B——— within ——— days from the date of notice of this order, the sum of ——— dollars for the purpose named in the said motion. And in lieu of formal notice, the clerk of said court is hereby directed to make two copies of this order, one to be served upon the said A——— B———, and the other to be returned by the sheriff of said county to said clerk's office containing an endorsement of the time and manner of the service thereof.

———,
Judge.

The clerk will enter the foregoing in the chancery record as a vacation order as to the ——— day of ———, 19—.

———,
Judge.[61]

[61] That part of the above form embraced in brackets is not intended for use in an order of this character when the wife is defendant and makes application in vacation for an allowance of temporary alimony, and that part of the form need never be used unless the wife is the plaintiff and applies for alimony *pendente lite*, before process commencing the suit has been issued, but if process has not been issued the defendant must have notice of the application, and the order should recite such fact. See Coger v. Coger, 48 W. Va. 135, 35 S. E. 823, which decides that "when a bill praying for a divorce and alimony is presented to a circuit court in vacation by a wife before any process has been issued against the defendant husband, such judge has no jurisdiction to enter a decree for alimony *pendente lite* or permanent alimony without first in some manner summoning the husband to appear, and then affording him an opportunity to be heard, and, should such a decree be entered without first citing the husband, a writ of prohibition will lie to prevent its enforcement."

No. 375.

§ 1243. Appointing commissioners to assign dower.

[*After the style of the cause and proper recitals.*]

Upon consideration whereof, the court doth adjudge, order and decree that A. B., C. D., E. F., G. H. and L. M., who are hereby appointed commissioners for the purpose, any three or more of whom being first duly sworn for the purpose may act, after having given notice to all persons interested, do go upon the land in the bill and proceedings mentioned and described, of which the late N. N. was seized of an estate of inheritance during his marriage with the plaintiff, Mary N———, and assign and allot to the said Mary N———, widow of the said N——— N———, by metes and bounds, one equal third part in value of the said land as her dower therein; and if for the proper performance of their duties under this decree it becomes necessary, in the opinion of the said commissioners who shall act hereunder, they are hereby authorized and directed to employ a competent surveyor, who shall lay off the said land, or such part thereof as may be necessary, and make a plat thereof. And the said commissioners are directed to report their proceedings hereunder to the next term of the court.[62]

[62] The above form is taken from Sands, Suit in Equity (2nd Ed.), 577. The following is the form found in the record of the case of Martin v. Smith, 25 W. Va. 579.

[*After the style of the suit.*]

This cause came on this day to be further heard upon the bill and former proceedings had therein, and was argued by counsel. On consideration of all which, the court is of the opinion that the said plaintiff, L——— J——— M———, widow of G——— M———, deceased, is entitled to dower in the lands in the bill and proceedings mentioned, of which G——— M——— died seized and possessed in M——— county; it is therefore adjudged, ordered and decreed that F——— W——— S———, A——— R——— B——— and J——— J——— who are duly appointed commissioners for that purpose, do, after having been duly sworn for that purpose, adjudge and allot to the said L——— J——— M———, widow as aforesaid, dower in all the said real estate of which said G——— M——— died seized and possessed, having due regard to quality, quantity and value, alloting to the said L——— J——— M——— one-third of said real estate during her natural lifetime, and report their proceedings under this decree to this court.

No. 376.

§ 1244. Confirming report of commissioners assigning dower.

[*After the style of the suit.*]

This cause came on again to be heard upon the former orders and decrees made and entered herein; upon the report of commissioners [*naming them*] heretofore appointed to assign dower to Mary N———, widow of N——— N———, deceased, which is now filed in this cause; and upon the argument of counsel.

Upon consideration of all which the court is of opinion to and doth hereby ratify the said report, as well also as the assignment of dower made to said Mary N——— as shown by said report. It is therefore adjudged, ordered and decreed that the said Mary N——— do take and hold as and for her dower in and to the real estate of the said N——— N———, deceased, for and during the term of her natural life, the following land situated in the county of ———, and bounded and described as follows: [*here describe the same by proper metes and bounds*], subject to the payment of all taxes, assessments and other charges thereupon, legally accruing after she shall take possession thereof. And a writ of possession may issue for said land upon the application or motion of said Mary N———. It is further adjudged, ordered and decreed that said Mary N——— do recover of and from the defendants her costs in and about the prosecution of her suit in this behalf expended.[63]

No. 377.

§ 1245. Directing the payment of a gross sum in lieu of dower.

[*After the style of the cause and proper recitals.*]

On consideration whereof, the several parties hereto assenting to the commutation of the dower of Mary N——— in the real

[63] See Hartley v. Roffe, 12 W. Va. 413.

estate of her late husband, N——— N———, in the proceedings mentioned, the court doth adjudge, order and decree that the said Mary N———, in lieu of her dower aforesaid, is entitled to receive at once the gross sum of ——— dollars, and the court doth further adjudge, order and decree that out of the proceeds derived from the sale of the real estate of N——— N———, deceased, hereinafter directed, that said Mary N——— be paid the said sum of ——— dollars; which sum, when so paid, is hereby declared to be in full of her dower in the real estate aforesaid as widow of the said N——— N———, deceased.[64]

No. 378.

§ 1246. Overruling some exceptions to commissioner's report and sustaining others.

[*After the style of the cause.*]

This cause came on this day to be again heard on the papers formerly read, and the report of commissioner W., made in pursuance of the interlocutory decree entered herein on the ——— day of ———, 19—, and upon the exceptions of the plaintiffs and the defendant, P. S. J., administrator of M. T., deceased, returned with the said report, and also upon the exceptions of the said defendant this day filed and the examination of witnesses and exhibits filed since the former hearing, and was argued by counsel.

On consideration whereof the court doth overrule all the exceptions of the plaintiffs to the said report, and doth also overrule all the exceptions of the said defendant, P. S. J., administrator as aforesaid, except so far as one of the said exceptions of the said defendant refers to and embraces the first item in special statement F, made by the commissioner at the instance of the said defendant, to-wit: the item of $99 in said special statement, dated ——— day of ———, 19—, for the provisions furnished, as to which item and the interest thereon the court

[64] Sands, Suit in Equity (2nd Ed.), 577, 578.

is of opinion that the same should have been allowed as a credit to the estate of the said M. T., deceased, and that the balance of $———, reported by the commissioner as due to the plaintiffs, should be reduced by the said sum of ninety-nine dollars and the interest thereon, amounting to five dollars and ninety-five cents, leaving the sum of $——— due the plaintiffs on the ——— day of ———, 19—, for which, in the opinion of the court, they are entitled to a decree and the court confirms the said report in all other respects; and it appearing therefrom by the special statement E, made by the commissioner at the instance of the said defendant, P. S. J., administrator as aforesaid, that he has assets of his intestate in his hands sufficient to satisfy this decree, the court doth adjudge, order and decree that the defendant, P. S. J., administrator of M. T., deceased, do pay to the plaintiffs the said sum of $———, with interest thereon, to be computed after the rate of six per centum per annum, from the ——— day of ———, 19—, until paid, and their costs by them about their suit in this behalf expended; the same to be paid out of the assets unadministered still in the hands of said P. S. J., administrator aforesaid, belonging to the estate of said decedent.[65]

No. 379.

§ 1247. Of reference for the settlement of executorial and administration accounts.

[*After the style of the suit and the proper recitals as indicated in No. 318 to the ° and then continue as follows:*]

First, all of the personal estate owned by said decedent, J. K., at the time of his death and with which said G. H. as administrator of the estate of such decedent is properly chargeable;

[65] Sands, Suit in Equity (2nd Ed.), 525, 526. As to the form in which a debt or claim should bear interest, when the same has been reduced to a judgment or decree, see *ante*.

Second, what disposition, if any, the said G. H. as such administrator has made of such estate;

Third, what sums, if any, have been paid by said administrator to the heirs and distributees of said J. K., deceased, when paid, and to which distributees paid;

Fourth, what amount of said estate, if any, is now in the hands of said G. H. as such administrator;

Fifth, what debts, if any, are payable by the estate of said J. K., deceased, to whom payable, and their respective amounts and priorities;

Sixth, and such other matters as any party in interest may require, the same being pertinent, or such other matters as said commissioner himself may deem pertinent, whether so required or not. But before said commissioner shall proceed to take said account, he shall give notice to the parties to this suit of the time and place of the taking thereof, by publication for ——— successive weeks in ———, a newspaper published in this county.

And what the said commissioner shall do under this decree, he shall report to the next term of this court, until which time this cause is continued.

No. 380.

§ 1248. Dismissing bill to set aside deed on the grounds of fraud and undue influence.

[*After the style of the suit and proper recital.*]

Upon consideration of which the court is of opinion and doth so adjudge, order and decree that J. E. J. was, on the ——— day of ———, 19—. the time when the deed in the bill and proceedings mentioned and described was executed, of sound mind, and capable of making said deed; that said deed was not obtained by the undue or improper influence of J. T. J., or any other person, and that the said deed was fairly made and was the free and voluntary act of the grantor, J. E. J.

It is therefore further adjudged, ordered and decreed that the plaintiff's bill be and the same is hereby dismissed, and that the plaintiff do pay unto the defendant his costs about the prosecution of his defense in this behalf expended.[66]

No. 381.

§ 1249. Setting aside fraudulent conveyance in favor of creditors.

[*After the style of the suit and the recitals as shown in No. 342 to the * continue as follows:*]

It is therefore adjudged, ordered and decreed that the plaintiff do recover of and from the defendant C——— D——— the sum of ——— dollars, the debt and demand in the bill and proceedings mentioned and described, including the interest thereon to this date, with legal interest on said sum of ——— dollars till paid and the costs of this suit.

And it appearing to the satisfaction of the court from the papers and evidence in this cause that the deed from the said C——— D——— to the defendant E——— F———, bearing date on the ——— day of———, 19—, conveying the land therein described to the said E——— F———, was made to hinder, delay and defraud the creditors of said C——— D———, and especially the plaintiff A——— B——— in respect to the debt and demand aforesaid, it is therefore further adjudged, ordered and decreed that the said deed, bearing date as aforesaid, be and the same is hereby set aside and held for naught, but so far only as the said debt and demand of said plaintiff A——— B——— is concerned.

It is further adjudged, ordered and decreed that said C——— D——— do pay unto the said A——— B———, within ——— days from the rising of this court, the said sum of ——— dollars with legal interest thereon from this date until paid and also the costs of this suit; and in default thereof, then J———

[66] See Jones v. McGruder, 87 Va. 360, 12 S. E. 792.

R——— S———, who is hereby appointed a special commissioner for that purpose, shall sell said real estate, or so much thereof as may be necessary to pay said debt and interest thereon and the costs of this suit, at public auction at the front door of the court house of this county to the highest bidder, after having first advertised the time, terms and place of sale for four successive weeks in some newspaper published in this county and by posting notice at the front door of the court house thereof for a like period prior to the day of such sale, upon the following terms: one-third of the purchase money cash in hand on the day of sale, and the residue in two equal installments on a credit of one and two years respectively, the purchaser giving his notes therefor with good personal security payable to said J——— R——— S———, or order, bearing interest from the date of such sale, and the said commissioner shall retain the legal title to said land as a further security; and out of the proceeds of such sale upon its confirmation payment shall be made of said debt, interest and costs, and the residue, if any, shall be paid to said E——— F———. But before making such sale said special commissioner shall give bond in the penalty of——— dollars, before the clerk of this court, conditioned for the faithful performance of his duties as such commissioner, and to account for and pay over to the parties entitled thereto all moneys which shall come to his hands by virtue of this decree; and what said commissioner shall do under this decree, he shall report to the next term of this court.[67]

No. 382.

§ 1250. For distribution of personal estate by administrator or executor.

[*After the style of the suit.*]

This cause came on this day further to be heard on the papers formerly read, former orders and decrees entered herein,

[67] See *ante*, § 630, upon the principles announced in which the above form is founded.

and the report of the commissioner made in pursuance of the order of the ——— day of ———, 19—, entered in this cause, and was argued by counsel; on consideration whereof the court doth adjudge, order and decree that the defendant, F——— F———, executor of X——— X———, deceased, do pay to the plaintiff P——— F———, the sum of $——— with interest at the rate of six per centum per annum from the ——— day of ———, 19—, until paid; to R——— F———, executor of N——— F———, deceased the sum of $———, with interest at the rate of six per centum per annum from the ——— day of ———, 19—, until paid. But the said P——— F——— and R——— F———, executor of N——— F———, deceased, are not to have the benefit of this decree until they shall respectively enter into bond, with sufficient security, in the office of the clerk of this court in a penalty equal to double the sums decreed to them respectively, payable to the defendant, F——— F———, executor of X——— X———, deceased, conditioned to refund a due proportion of any debts or demands which may hereafter appear against the estate of the said X——— X———, deceased, and of the costs attending the recovery of such debts or demands.[68]

No. 383.

§ 1251. Foreclosure of mortgages by sale of the premises.

[*After the style of the suit and proper recitals.*]

On consideration whereof, the court doth adjudge, order and decreee that the defendant, R——— M———, do within ——— months from the rising of this court, pay to the plaintiff, J——— C———, the sum of ——— dollars, with legal interest thereon from this date until paid and the costs of this suit; and it is further ordered that, if the said defendant shall, within the period aforesaid, pay to the said plaintiff the said sum of

[68] See Sands, Suit in Equity (2nd Ed.), 527, from which the above form is taken.

money with interest as aforesaid and the costs of this suit, then the said plaintiff do reconvey the mortgaged premises in the bill and proceedings mentioned to the said defendant, free and clear of all encumbrances done by him, or any one claiming by, from or under him, the said plaintiff. And the court doth further adjudge, order and decree that unless the defendant do within ——— months from the rising of this court pay the said sum of money with interest and costs as aforesaid to the plaintiff, then C——— H———, who is hereby appointed a special commissioner for that purpose, do, after having advertised the time, terms and place of sale for four successive weeks in some newspaper published in this county, and having posted the same for a like period of time at the front door of the court house in said county, sell, at public auction, to the highest bidder, at the front door of the court house of this county, the land in the bill and proceedings mentioned and described upon the following terms: one-third of the purchase money to be paid in cash on the day of sale, and the residue payable in two equal instalments at one and two years respectively from day of sale, the purchaser giving his notes with good personal security for such deferred payments, and the legal title to said property to be retained until all the purchase money has been paid and a conveyance directed by the court. But the said C——— H——— shall not make said sale until he has given bond with approved security before the clerk of this court in the penalty of ——— dollars, conditioned for the faithful performance of his duties as such special commissioner, and what the said C——— H——— shall do under this decree, he will report to the next term of this court. All of which is adjudged, ordered and decreed accordingly.[69]

[69] This form is adapted from one found in Sands, Suit in Equity (2nd Ed.), 579.

No. 384.

§ 1252. For an account of rents and profits under bill for equity of redemption.

[*After the style of the suit and proper recitals.*]

On consideration whereof, the court doth adjudge, order and decree that the papers in the cause be referred to one of the commissioners of this court, who is hereby directed to take an account of what is due the defendant C——— R——— for principal and interest on the mortgage in the bill mentioned, after deducting whatever amount of the rents and profits of the said mortgaged premises the said defendant C——— R——— may have received, or which may have come to the hands of any other person or persons by his order or for his use, or which he without his willful default might have received. And the said commissioner is directed to examine, state and settle the said account and report the same to the court, with any matter specially stated, deemed pertinent by himself, or required by any of the parties to be so stated.[70]

No. 385.

§ 1253. Referring cause on guardian's bill to sell real estate to a commissioner in chancery.

J——— W———, guardian of R——— S———,
vs.
R——— S———, an infant under twenty-one years of age, and J——— S——— and V——— M———. } In Chancery.

This day came the plaintiff and filed his bill and J——— H——— is assigned guardian *ad litem* to the infant defendant R——— P———, to defend his interests in this suit; and there-

70 The above form is taken from Sands, Suit in Equity (2nd Ed.), 581, 582.

upon the said guardian *ad litem* filed the answer of the said infant defendant and his own answer to the bill of the plaintiff, duly sworn to [and the said R——— P——— being over fourteen years of age filed his own answer duly sworn to, to the said bill]; and the adult defendants filed their answer; to which several answers the plaintiff by counsel replied generally, and the cause was docketed by consent, and coming on to be heard, by like consent, upon the bill, answers and replications, was argued by counsel: On consideration whereof, the court doth adjudge, order and decree, that the papers in the cause be referred to L——— K——— J———, one of the commissioners of this court, who is directed to inquire into and report to the court:

1. Whether the interest of the infant defendant will be promoted by the sale of the property in the bill mentioned or of any part thereof and the investment of the proceeds of sale in other property.

2. Whether the rights of any person will be violated by such sale; which inquiries the said commissioner shall make and report to the court together with any matters specially stated deemed pertinent by himself or required by any of the parties to be specially stated.[71]

[71] This form will be found in Sands, Suit in Equity (2nd Ed.), 550, and serves as an illustration of how a court of equity may satisfy itself as to the propriety of decreeing the sale of the estate of an infant.

"Testator says, believing that a division of my property at this time would be ruinous to the general interest of my wife and our children, my will and desire is that all my estate (after payment of my debts as before provided for), be kept together until my youngest child becomes of age to be controlled and managed by my executors and my wife, with their best discretion; so as to make it productive of the greatest amount of profits for the support of my wife and children. *Held*, That a court of equity may direct a sale of the real estate if it is for the benefit of the infant children, and those who are of age consent." Talley v. Starke, 6 Gratt. (Va.) 339.

No. 386.

§ 1254. Confirming commissioner's report and directing sale of infant's lands.

[*After the style of the cause.*]

This cause came on this day to be again heard upon the papers formerly read herein; upon the orders and decrees made and entered herein; upon the report of commissionr L——— K——— J——— filed since the last hearing, to which report there is no exception; upon the depositions taken before said commissioner and returned with the said report; and was argued by counsel.

And it appearing from said report and evidence therewith returned that the interests of the plaintiff's said ward will be promoted by a sale of the real estate in the said bill and proceedings mentioned and described, and that the rights of no one will be violated by a sale thereof; it is therefore adjudged, ordered and decreed that sale be made of the estate of the said infant, and that for the purpose of making such sale W——— W——— is hereby appointed a special commissioner, who, after having advertised the time, place and terms of sale once a week for four successive weeks in some newspaper published in this county, and by posting notice of the same at the front door of the court house of this county for a like period, shall make sale of the said property at public auction at the front door of the court house of this county to the highest bidder, in one or more parcels as to the commissioner may seem most advantageous to the parties in interest, upon the following terms, to-wit: [*here set forth the terms*]. If the said commissioner deem it best to sell in parcels he may employ a surveyor to lay off the same in one or more parcels, making a plat of the same, and the said commissioner is directed to deposit the cash instalment, deducting therefrom the expenses of sale, including a commission and fee of the surveyor if one be employed, and a fee of ——— dollars to the counsel instituting this suit, in the M——— N——— Bank, to the credit of the court in this suit, and report his proceedings therein to the court, returning therewith a

certificate of such deposit, and the notes or bonds given for the credit instalments. Before the said special commissioner, W——— W———, shall make any sale under this decree in chancery, he shall have entered into bond with good security, to be approved by the clerk of this court, conditioned for the faithful discharge of his duties as such commissioner.[72]

No. 387.

§ 1255. Upon guardian's petition to sell real estate of infant, hearing evidence and authorizing sale thereof.

A——— B———, guardian of C——— D———,
vs.
C——— D———, an infant under twenty- one years of age.
} In Chancery and upon Petition.

**This day A——— B———, guardian of C——— D———, an infant under the age of twenty-one years, presented to the court his petition duly verified by his own affidavit praying for permission to sell certain real estate belonging to said infant in said petition described, and asked leave to file the same which is accordingly done. Thereupon, the said A——— B———, guardian as aforesaid, moved the court for the appointment of a guardian *ad litem* for the said C——— D———, and for a hearing on said petition; and it appearing to the court that due and sufficient notice of the application for a hearing upon said petition has been given to said C——— D——— and all other

[72] The above form is taken in substance from one appearing in Sands, Suit in Equity (2nd Ed.), at pp. 554, 555. It will be observed that this sale is directed upon the report of a commissioner to whom the court referred the matter of ascertaining whether a sale of the property would be promotive of the interests of the infant, and whether the rights of any person would be violated by such sale. The court, instead of determining the fact for itself, referred the matter to a commissioner as in other cases in which a commissioner may ascertain and report upon matter of fact.

persons interested, the court doth hereby appoint E——— F——— as a suitable and proper person to act as guardian *ad litem* for the said C——— D———, who appeared and filed his answer duly sworn to, as such guardian *ad litem*, and the said infant, who is over fourteen years of age, also appeared and filed his answer which is also properly sworn to.

And now this matter coming on to be heard upon the said petition, and its exhibits; the answers of the said guardian *ad litem* and the said infant, with general replication to each of said answers, the said guardian *ad litem* being present in person, the court proceeded to hear and did hear, all the evidence upon the questions arising upon said petition, and the argument of counsel thereon. Upon consideration of all which the court is of opinion that a sale of the real estate in the said petition mentioned and described will promote the interests of the said C——— D———, the same appearing to the court independently of any admissions in the answers, and it further appearing, and the court so being of opinion, that the rights of no person will be violated or affected by a sale of such real estate, it is, therefore, adjudged, ordered and decreed * that the said real estate belonging to said C——— D——— be sold, either at public or private sale, whichever, in the opinion of the special commissioner hereinafter appointed will be most conducive to the interests of the parties concerned, upon the following terms: one-third of the purchase money in cash on the day of sale, and the residue in two equal instalments, payable in one and two years respectively, the purchaser giving his notes therefor drawing interest from the day of sale, with good personal security, payable to such special commissioner, and likewise his bond, with ample security, and the legal title to be retained further to secure the payment of such deferred instalments. And for the purpose of making such sale, J——— W——— M——— is hereby appointed a special commissioner, who shall give bond in the penalty of ——— dollars before the clerk of this court conditioned for the faithful performance of his duties as such special commissioner, and to account for any and all moneys that shall come into his

hands under this decree. But before making said sale, the said commissioner shall advertise the time, terms and place of such sale in ———, a newspaper published in this county, for four successive weeks prior to the time of making such sale, and shall post the same for a like period at the front door of the court house of this county. And what the said special commissioner shall do under this decree he shall report at the next term of this court.[73]

No. 388.

§ 1256. Confirming sale of infant's land and directing investment of proceeds of sale.

[*After the style of the suit as indicated in No. 387 to the* **.]

This cause came on this day again to be heard upon the papers formerly read herein; upon the former orders and decrees entered therein; upon the report of sale of W——— W———, to which no exceptions have been filed, and the court seeing no just ground of exception thereto, the said report is hereby ratified and confirmed.

And it appearing from said report that M——— C——— became the purchaser of the real estate heretofore directed to be sold, belonging to the infant defendant, R——— L———, at the price of nine hundred dollars, and that the cash instalment of three hundred dollars was duly paid to the said special commissioner, and by him deposited in the M——— N——— Bank to the credit of this suit, for which the said commissioner has filed a certificate of deposit with his said report, and that the said purchaser has given his two notes for three hundred dollars each, payable to the said special commissioner or order, with interest from date, and which are also filed herein; it is therefore adjudged, ordered and decreed that, upon the payment by the said purchaser of the said notes, then the said special com-

[73] The above form is constructed from the provisions of the statute of West Virginia, Code, c. 83, § 14.

missioner do make, acknowledge and deliver for record, an apt and sufficient deed of conveyance with covenants of special warranty conveying to the said M——— C——— the title to the lands purchased by him as aforesaid, for which the said special commissioner shall be allowed a fee of five dollars, to be taxed as part of the costs of this suit. And it is further adjudged, ordered and decreed that out of the proceeds of the cash payment the said special commissioner do pay the costs of this suit, including the costs of the said sale, and the residue of the proceeds he shall pay over to the plaintiff in this suit, the guardian of the said infant, as well also as the proceeds of the said notes, when paid, for which the said special commissioner shall take the receipts of the said guardian, and file the same among the papers of this cause.

And it is further adjudged, ordered and decreed that before the said guardian shall receive the said money he shall enter into bond in open court with approved security, in the penalty of ——— dollars, conditioned for the faithful application and investment of the proceeds of said sale which shall come to his hands under and by virtue of this decree, and for the management and preservation of the same and the securities until the same may be invested, and for the protection of the rights of all persons interested therein, whether said rights be vested or contingent.

And the court doth further adjudge, order and decree that, upon the execution of said bond, and the receipt of said money by the said guardian, he is hereby directed and required to invest the same in good personal security, bearing interest from the date of the investment, and providing for the annual payment of the interest; and the said investment shall be made within ——— days from the time the said money shall have been received by the said guardian. All of which is adjudged, ordered and decreed accordingly.[74]

[74] This form is constructed from the requirements of the statutes of West Virginia, Code, c. 83, §§ 15, 17.

No. 389.

§ 1257. Entering rule against purchaser at judicial sale for failure to comply with his purchase.

[*After the style of the cause.*]

This cause came on this day again to be heard on the papers formerly read herein, and former orders and proceedings had therein; and was argued by counsel. Upon consideration whereof the court doth adjudge, order and decree that R——— R———, being served with a copy of this order ten days before the ——— day of ———. 19—, do on that day show cause to the court, if any he can, why he should not be compelled to comply with his purchase of the ——— acres of land from W——— W———, special commissioner in this cause, and upon his failure to do so why the said land should not be resold at his risk and costs.[75]

No. 390.

§ 1258. Overruling exceptions to commissioner's report of sale of infant's land, and requiring purchaser to comply with terms of sale.

[*After the style of the cause.*]

This cause came on this day to be heard upon the papers formerly read herein; upon the former orders and decrees made and entered therein; on the return and answer of R——— R——— to the rule to show cause, entered upon the ——— day of ———, 19—; and on the documents and evidence filed there-

[75] The purchaser of land at a judicial sale can obtain relief for defects in the title or incumbrances on the property only by resisting the confirmation of the sale by the court upon the return of the commissioner's report. Threlkelds v. Campbell, 2 Gratt. (Va.) 198.

This, as here stated, seems to be the general rule in Virginia, and objections made to the sale after its confirmation because of defect of title comes too late. Watson v. Hoy, 28 Gratt. (Va.) 710; Young v. McClung, 9 Gratt. (Va.) 358; Daniel v. Leitch, 13 Gratt. (Va.) 212; Long v. Weller, 29 Gratt. (Va.) 351. And the same rule, it is believed, obtains in West Virginia. Hyman v. Smith, 13 W. Va. 772, *et seq.*

with in support thereof, and on the evidence of X——— X———, and W——— W———, and on the report of special commissioner W——— W———, and exceptions thereto; and the court now being fully advised of its judgment, doth adjudge, order and decree that the said exceptions of the said R——— R——— to the report of the said commissioner W——— W———, be overruled, and the said report be and the same is hereby ratified and confirmed.

And the court doth further adjudge, order and decree that the purchaser, R——— R———, do comply with the terms of his purchase of the tract of land sold to him by the said commissioner, W——— W———, and that the said R——— R——— pay to the said W——— W———, commissioner as aforesaid, within ——— days from the entry of this decree, the sum of ——— dollars, that being the cash instalment of his said purchase, and execute to the said W——— W———, commissioner, with ample security, his three bonds [*or* notes *further secured by his bond with ample security*], to be dated as of the day of sale, to-wit: on the ——— day of ———, 19—, for the sum of ——— dollars each, with interest, payable from their date at one, two and three years respectively; and unless the said R——— R——— shall, within the time aforesaid, make the said payment and execute his bonds aforesaid, then the said special commissioner, after advertising the time, terms and place of sale once a week for four successive weeks in some newspaper published in this county prior to the day of sale, and posted, in addition thereto, at the front door of the court house of this county for a like period, shall sell at public auction to the highest bidder, at the front door of the court house of this county, at the risk and cost of the said R——— R———, the tract of land so purchased by said R——— R———, to-wit: [*here describe the same*]; on the following terms, to-wit: [*here set forth the terms*]; and the said commissioner is directed to deposit the cash instalment of purchase money in the M——— N——— Bank to the credit of the court in this cause; and to return a certificate of such deposit,

and the bonds given for the deferred payments, with his report of sale, to the court. [*Here require the usual bond to be given by the commissioner.*][76]

No. 391.

§ 1259. Awarding an injunction by a judge in vacation to restrain the commission of waste.

[*After the style of the cause and the court in which it is pending.*]

This day A——— B——— by his counsel presented his bill with its accompanying exhibits, duly verified by affidavit, to the undersigned judge of the circuit court of ——— county, and state of ———, in the vacation of said court, praying for an injunction against C——— D———, restraining and enjoining him from cutting down and destroying certain ornamental and shade trees standing and growing upon the premises in the said bill mentioned and described, and upon consideration of said bill and exhibits the undersigned judge is of opinion to and doth hereby award an injunction as prayed for in said bill.* But said injunction is not to take effect until bond with good security has been given before the clerk of the said court in the penalty of ——— dollars, conditioned to pay such costs as may be awarded against the said A——— B———, and also such damages as shall be incurred by the said C——— D———, in case the said injunction shall be hereafter dissolved.

†V——— S———,
Judge of the Circuit Court of ———
County, State of ———.[77]

The clerk of the said court will enter the foregoing as a vacation order as of the date of the ——— day of ———, 19—.

[76] The foregoing form is prepared from a similar one found in Sands, Suit in Equity (2nd Ed.), pp. 559-561.

[77] See Sands, Suit in Equity, 586.

No. 392.

§ 1260. Awarding an injunction by the court in term time to judgments at law.

[*After the style of the suit.*]

On motion of the plaintiff, by counsel, and for good cause shown, an injunction is hereby awarded enjoining and restraining the defendant, S. L., his agents, attorneys and all others, from further proceedings on a judgment, recovered by the said defendant against the plaintiff in this suit in the circuit court in the county of ———, on the ——— day of ———, 19—, and in the sum of ——— dollars, until the further order of the court.

But the said injunction is not to take effect until the plaintiff in this suit, or some one on his behalf, shall enter into bond with sufficient security before the clerk of this court in a penalty equal to double the amount of the said judgment, conditioned to pay the said judgment and all such costs as may be awarded against the said plaintiff in this suit, and all such damages as shall be incurred by the said S. L., in case said injunction shall be hereafter dissolved; *nor until the plaintiff herein also files with the clerk in the said circuit court in ——— county a release of all errors at law in the said judgment and proceedings.*[78]

No. 393.

§ 1261. Awarding injunction in vacation without bond.

[*Proceed as in No. 391 to the *, and then as follows:*] And it appearing to the court that the above named C———

[78] The above form is adapted from a similar one found in Sands, Suit in Equity (2nd Ed.), 596, 597. It will be observed that the foregoing form provides for a release of all errors at law in the said judgment and proceedings before the injunction shall take effect. This rule as to the release of errors has been greatly relaxed in modern practice in the Virginias, and may be said to practically no longer obtain. Warwick v. Norvill, 1 Rob. (Va.) 308; Great Falls Manf. Co. v. Henry, 25 Gratt. (Va.) 575; Parsons v. Snyder, 42 W. Va. 517, 26 S. E. 285. See *ante*, § 748, and later cases cited.

C——— L——— is the receiver of the circuit court of ——— county, and therefore an officer of this court [*or* it appearing to the satisfaction of the court that this is a case in which bond should not be required], the foregoing injunction is awarded to take effect without bond. [*Conclude as in No. 391 from the* †.][79]

No. 394.

§ 1262. For an injunction against a corporation.

[*After the style of the cause, and in No. 392 or No. 393, as the case may require, and then as follows:*] An injunction is hereby awarded, restraining and enjoining the said N——— W——— Company, its officers, agents and employes from [*here insert the act or acts enjoined, as in an ordinary injunction order.*][80]

No. 395.

§ 1263. Made in vacation overruling motion to dissolve an injunction.

Before the undersigned judge of the circuit court of ——— county and state of ———, in vacation, came the defendant by counsel in the chancery cause of A——— B——— against C——— D———, pending in the said court, and submitted a

[79] See W. Va. Code, 1913, c. 133, § 10.

[80] If an injunction be issued against a corporation it is usual to make the restraining order extend to its officers, agents, employes and servants, and these words are rarely omitted from an order of this character, if ever. Foster, Fed. Prac. (1st Ed.), 234; 2 Dan., Ch. Pl. and Pr. (5th Am. Ed.), 1673; Seton, Decrees (4th Ed.), 173; Mexican Ore Co. v. Mexican Guadalupe Min. Co., 47 Fed. 351, 356. This form of an injunction against a corporation is generally necessary in order to enable the court to enforce its writ. A corporation acts only through its officers and employes, and it is through them only that its action can be restrained or compelled. While doing the work of the company, the employe is the company, and having notice of a mandate of a court of competent jurisdiction, as to how that work must be done, he must, in his work, obey the mandate. Toledo, A. A. & N. M. P. Co. v. Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 393.

motion to dissolve the injunction heretofore awarded herein, upon the bill, answer, replication depositions taken therein, upon the notice duly served upon the said plaintiff of the time and place of making this motion, and upon the argument of counsel thereon for plaintiff and defendant. Upon consideration of all which the undersigned judge doth hereby * overrule said motion, and doth refuse to dissolve the said injunction.†

———,

Judge of the Circuit Court of ——— County, and State of ———.

The clerk of the circuit court of ——— county, and state of ———, will enter the foregoing as a vacation order, as of the date of the ——— day of———, 19—.

———,

Judge.

No. 396.

§ 1264. Made in vacation dissolving an injunction.

[*As in No. 395, to the *, and then continue as follows:*] sustain said motion and doth dissolve said injunction. [*Conclude as in No. 395 from the* †.][81]

No. 397.

§ 1265. Made in term time overruling motion to dissolve injunction.

[*After the style of the cause.*]

This cause came on this day to be heard upon the plaintiff's bill and its exhibits; upon the motion made by the defendant to dissolve the injunction heretofore awarded in this cause; and was argued by counsel. On consideration whereof the court is of opinion that the said injunction ought not to be dissolved; and it is therefore adjudged, ordered and decreed that the said motion to dissolve said injunction awarded in this case be and the same is hereby overruled.[82]

[81] Arbuckle v. McClanahan, 6 W. Va. 101, 107.

[82] See Cox v. Douglass, 20 W. Va. 177, 178.

No. 398.

§ 1266. Made in term time, dissolving an injunction and dismissing the bill.

[*After the style of the suit.*]

This cause came on this day to be heard upon the bill and its exhibits; upon the answer of the defendant to said bill and general replication thereto; upon the depositions taken and filed in the cause; upon the defendant's motion to dissolve said injunction and to dismiss the plaintiff's bill; and upon argument of counsel.*

Upon consideration whereof the court is of opinion that the injunction heretofore awarded in this cause ought to be wholly dissolved. It is therefore adjudged, ordered and decreed that the said injunction be and the same is hereby wholly dissolved. And the sole purpose of this suit, as appears to the court, being to obtain the injunction aforesaid, and the plaintiff showing no sufficient cause why his said bill should not be dismissed, it is therefore adjudged, ordered and decreed that the said bill be and the same is hereby dismissed, and that the defendant do recover of the plaintiff his costs about his defense by him in this behalf expended, including a statute fee of twenty dollars.[83]

No. 399.

§ 1267. Dissolving injunction to an action at law, and setting aside a confession of judgment.

[*After the style of the suit and the proper recitals:*] Upon consideration whereof it is adjudged, ordered and decreed that the injunction heretofore awarded the plaintiff in this suit on the ——— day of ———, 19—, be and the same is hereby dissolved. But this order shall not take effect until the plaintiff in the action at law shall have withdrawn, or caused to

[83] Werninger v. Wilson, 2 W. Va. 5; Bank v. Fleshman, 22 W. Va. 318.

be set aside, the judgment obtained by confession, as a condition precedent to the awarding of said injunction, and shall have caused said action at law to be reinstated upon the trial docket to be tried at law, upon the issue in the case or such other proper issue or issues as may be hereafter made up. [*Conclude with a judgment for costs on behalf of the defendant.*][84]

No. 400.

§ 1268. Perpetuating an injunction to a trust sale.

[*After the style of the suit, and as indicated in No. 398 to the *, and then continue as follows:*] Upon consideration of all which the court is of opinion, and doth so adjudge, order and decree, that the plaintiff is entitled to the relief prayed for in his said bill. It is therefore adjudged, ordered and decreed, that the injunction heretofore awarded in this cause, restraining C——— D———, trustee in the deed of trust bearing date on the ——— day of ——— 19—, executed by A——— B——— to said C——— D——— to secure the payment of a debt therein described to the defendant, E——— F———, from making sale of the property under the notice mentioned in said bill, be, and the same is hereby made perpetual. And it is further adjudged, ordered and decreed that said C——— D———, trustee, as well as said E——— F———, *cestui que trust*, be, and they are, and each of them is, perpetually enjoined from making sale, or attempting to make sale, of said property in said trust deed embraced, or any part thereof. And it appearing to the court that there is nothing due upon the said trust deed in the bill and proceedings mentioned and described, and that the same has been entirely paid off, and, therefore, the land thereby discharged, it is therefore, hereby adjudged, ordered and decreed that the defendant E——— F——— do execute a release within thirty days from the rising of this court, in the manner prescribed by law [chapter 76,

[84] The foregoing form is taken substantially from the one found in Great Falls Mfg. Co. v. Henry, 25 Gratt. (Va.) 575.

section 2, of the Code of this state], and deliver the same to the said plaintiff for record, and in default thereof that ——— be, and he is hereby, appointed a special commissioner to execute such release, which he shall do, and deliver the same to the said plaintiff for record, and for which the said special commissioner shall be allowed the sum of five dollars, to be taxed as a part of the costs of this suit.

It is further adjudged, ordered and decreed that the plaintiff do recover of and from the defendant his costs in and about the prosecution of his suit in this behalf expended, including a statute fee of ——— dollars.[85]

No. 401.

§ 1269. Dissolving injunction and discharging receiver.

[*After the style of the cause.*]

This cause came on this day to be heard upon the plaintiff's bill and its exhibits; upon the answer of the defendant and general replication thereto; upon the depositions taken and filed in the cause; upon the motion made by the defendant to dissolve the injunction heretofore awarded, and discharge the receiver appointed herein; and upon argument of counsel.

Upon consideration whereof, the court is of opinion that the order awarding the injunction and appointing a receiver in this cause ought not to have been made; and that the motion of the defendant to dissolve said injunction, as well as his motion to vacate the order appointing said receiver, is well taken and should be sustained. It is therefore adjudged, ordered and decreed that the said injunction be, and the same is hereby, dissolved; that the said order appointing J——— D——— L——— receiver in this cause, be, and the same is, hereby vacated and set aside, and the said J——— D——— L——— is discharged from his receivership in this suit; and he, the said J——— D——— L———, is hereby directed at once to

[85] Van Gilder v. Hoffman, 22 W. Va. 1, 43, 44.

settle his accounts, and to turn over the property now in his possession to the defendant, and that he refain from exercising any further control over any property heretofore committed to his charge or custody. [*Conclude with judgment for costs in favor of the defendant.*][86]

No. 402.

§ 1270. Dissolving injunction unless new bond be given.

A——— W———
vs.
W——— and others.

Upon rules to show cause why the injunction heretofore awarded in this cause should not be dissolved.

This cause came on this day to be heard upon the rules aforesaid, and upon the affidavits and depositions taken in relation thereto, and was argued by counsel. Upon consideration whereof it is adjudged, ordered and decreed that unless the complainant file a new bond in this cause with the clerk of this court with good security, in the penalty of ——— dollars, and conditioned [*here name the conditions*] within ——— days from this day, then the injunction heretofore awarded in this cause be and stand dissolved as an act of this day.[87]

No. 403.

§ 1271. Directing issue out of chancery.

[*After style of suit and proper recitals.*]

Upon consideration whereof the court doth adjudge, order and decree that an issue be made up and tried at the bar of this court, to ascertain and determine whether [*here insert the matter to be tried*]. And it is further adjudged, ordered and decreed that on the trial of the said issue the plaintiff shall maintain the affirmative and the defendant the negative; and on the said trial of said issue the bill, answer, exhibits and the

[86] See Cincinnati, etc., R. Co. v. Sloan, 31 Ohio St. 2.

[87] See Werninger v. Wilson, 2 W. Va. 5.

depositions of such witnesses as are dead, or where their attendance can not be secured, may be read in evidence, and such other evidence may be introduced by either plaintiff or defendant, as may be legal and proper.[88]

No. 404.

§ 1272. Directing an issue devisavit vel non.

[*After the style of the cause.*]

This cause came on this day to be heard upon the bill and its exhibits; upon the process duly executed upon the defendants; and upon the proceedings in this cause regularly had therein at rules; upon the answer of J——— B——— T———, committee of M——— B——— S———, a lunatic, and the plaintiffs' general replication thereto; upon the answer of W——— H——— B———, guardian *ad litem* of the infant defendants herein and the plaintiffs' general replication thereto; and upon the depositions taken and filed in this cause, both on behalf of the plaintiffs and the defendants.

And now, upon motion of the plaintiffs, it is adjudged, ordered and decreed that an issue be, and the same is hereby, directed, to be tried before a jury at the bar of this court, to ascertain "whether any, and if any, how much, of the paper writing probated on the ——— day of ———, 19—, in the office of the clerk of the county court of ——— county, in the state of ———, purporting to bear date on the ——— day of ———, 19—, and which purports to be the will of J——— M——— S———, deceased, is the will of the said J——— M——— S———, deceased."

And it is further adjudged, ordered and decreed that the clerk of this court be, and he is hereby, directed to place the said issue on the law issue docket of this court, and upon the trial of said issue before the jury the defendant in this suit,

[88] The foregoing form is taken from a similar one found in Sands, Suit in Equity (2nd Ed.), 623.

M——— B——— S———, a lunatic, J——— B——— T———, her committee, E——— S———, S——— S———, Z——— S———, and J——— M——— S———, Jr., the last four of whom are minors, shall be the plaintiffs upon the trial of said issue before the jury; and the plaintiffs in this suit, Z——— T———, W——— S——— S———, T——— R——— S———, M——— F——— S———, F——— F——— S———. G——— B——— S———, M——— E——— F——— and V——— V———, shall be the defendants upon the trial of the said issue.

And it is further adjudged, ordered and decreed that W——— H——— B———, the guardian *ad litem* of the infant defendants in this suit be, and he is hereby, appointed to act as the next friend of the said infants upon the trial of the said issue before the jury.

And it is further adjudged, ordered and decreed that the plaintiffs in this suit be, and they are hereby, permitted to read before the jury their bill filed in this cause; and like permission is given to the defendants herein to read their answers filed herein, for the purpose only of more clearly presenting to the jury that shall try said issue the scope thereof and to the better enable them, the said jury, to understand and determine the grounds of this contest; but said bill and answers shall not be taken and treated as evidence for or against any of the parties to this suit.

And it is further adjudged, ordered and decreed that the clerk of this court be and he is hereby directed to summon any and all witnesses desired by any of the parties to this suit to testify in their behalf upon the trial of the said issue, in the same manner and to the same extent as witnesses may be summoned upon the trial of an action at law; but the deposition of any witness heretofore taken in this cause whose attendance can not be procured before the jury that shall try said issue, because of sickness, death, or other inability to attend this court, or because he is beyond the jurisdiction of this court, may be read in evidence before the jury in the same manner and with the same effect as if said deposition had been hereafter

taken on any proper ground, for the express purpose of being used upon the trial of said issue.

And for the purpose of enabling the parties properly to prepare for the trial of the said issue, this cause is continued generally until the next term of this court.

No. 405.

§ 1273. Enforcing mechanic's lien.

[*After the style of the cause.*]

This cause came on this day to be heard upon the bill and exhibits therewith filed; upon the separate answer of the C——— C——— Company, and the plaintiff's replication thereto; and the bill regularly taken for confessed and set for hearing as to the defendants, S——— B———, J——— W——— C———, T——— A——— P——— and C——— S———. trustees, they still failing to appear, plead, answer or demur, though process has been duly served and executed upon the said last-named defendants; and was argued by counsel for the plaintiff and the defendant, the C——— C——— Company.

On consideration of all which, the court is of opinion that the mechanics' lien mentioned and described in the complainant's bill and exhibits therewith filed is a valid and subsisting lien upon the property in said lien set forth, and that the said plaintiff is entitled to the relief prayed for. It is, therefore, adjudged, ordered and decreed that the said E——— T——— recover of the said defendant, the C——— C——— Company, the sum of ——— dollars, including the interest thereon to this date, that being the amount due said plaintiff on the mechanics' lien set forth and described in the plaintiff's bill, and filed as "Exhibit A" therewith. It is further adjudged, ordered and decreed that, unless the said C——— C——— Company, or someone for it, do, within thirty days from the rising of this court, proceed to pay off and satisfy the aforesaid sum of ——— dollars, together with the costs of this suit, including a statute fee of ——— dollars as allowed by law, then J——— B———

M———, who is hereby appointed a special commissioner for that purpose, do proceed to sell, by way of public auction, at the front door of the courthouse of ——— county in the state of ———, to the highest bidder, after having advertised the time, terms and place of sale for four successive weeks in some newspaper published in the county aforesaid, the following described tract or parcel of land, with the buildings and appurtenances thereto, known as the Bedford Salt Furnace, and described in exhibits "A" and "B" filed with plaintiff's bill, said lot or tract of land being situated in the county and state aforesaid and in ——— district, and at the town of ———, and more particularly bounded as follows, to-wit: [*here describe the land*]; said sale to be upon the following terms: [*here set forth the terms*]. And out of the proceeds arising from said sale said special commissioner is directed first to pay the costs of this suit, and then the amount found and ascertained to be due the plaintiff as aforesaid, with interest thereon from this day, and any balance remaining in his hands over to said C——— C——— Company. But before said special commissioner shall make any sale under this decree he shall first give bond in the penalty of ———dollars, conditioned for the faithful performance of his duties as such special commissioner. And said special commissioner is directed to report his proceedings under this decree at the next term of this court, until which time this cause is continued.[89]

No. 406.

§ 1274. Enforcing vendor's lien.

[*After style of cause and recital as indicated in No. 318 to the * proceed as follows:*] From all of which it doth appear to the court that there is now due and owing from the defendant, C——— D———, to the plaintiff, A——— B———, on account of the sale of the lands in

[89] Taken from the record in Turnbull v. Clifton Coal Co., 19 W. Va. 299.

the bill and proceedings mentioned, including the interest thereon to date, the sum of ——— dollars, after allowing a credit thereon for all payments and set-offs to which the defendant is in any wise entitled. It is, therefore, adjudged, ordered and decreed that the said C——— D——— do pay unto the said A——— B———, within thirty days from the rising of this court, the sum of ——— dollars, with legal interest thereon from this date until paid, and the costs of this suit. And it further appearing to the court that the said A——— B——— did reserve a lien upon the face of the deed conveying said lands to said C——— D———, to secure the payment of the unpaid purchase money, that the said sum of ——— dollars is the residue or unpaid part of said purchase money, and that by reason of said reservation of a lien upon the face of said deed the said sum of ——— dollars constitutes and is the first and only lien on the lands in the bill and proceedings in this cause metioned and described, it is, therefore, adjudged, ordered and decreed that, if the said C——— D——— shall fail to pay said sum of ——— dollars within thirty days from the rising of this court, then said land be sold at public auction at the front door of the court house of this county upon the following terms: [*here insert the terms of sale*]; and for the purpose of making said sale R——— Q——— L——— is hereby appointed a special commissioner, but before doing so he shall advertise the time, terms and place of sale in some newspaper published in this county, for four successive weeks, and by posting notice thereof at the front door of the court house of this county for a like period. And before making such sale the said R——— Q——— L——— shall enter into bond before the clerk of this court with sufficient surety, to be approved by said clerk, in the penalty of ——— dollars, conditioned for the faithful performance of his duties as such commissioner. And what the said R——— Q——— L——— shall do under this decree he shall report to the next term of this court; until which time this cause is continued.[90]

[90] See Long v. Perine, 41 W. Va. 314, 23 S. E. 611; Triplett v. Lake, 43 W. Va. 428, 27 S. E. 363; McClaugherty v. Croft, 43 W. Va. 270,

No. 407.

§ 1275. Setting up lost instrument and entering decree thereon.

[*After the style of the suit and the proper recitals, proceed as follows:*] And it appearing to the court from competent and satisfactory proof herein that the defendant, C——— D———, did make and deliver to the said plaintiff, A——— B———, his negotiable promissory note bearing date on the ——— day of ———, 19—, payable to the order of said A——— B———, in ——— after the date thereof, at the ——— Bank, and in the sum of ——— dollars; and it further appearing to the court that at the time of the institution of this suit said plaintiff was still the owner of said note, that the same was then due and unpaid, and that said note and its interest now amounts to the sum of ——— dollars; the court is of opinion that the plaintiff ought to recover from the said C——— D——— said sum of ——— dollars, with legal interest thereon until paid. And it further appearing to the court that at the time this suit was instituted the said note was, and still is, lost, and that when the same was lost the said A——— B——— was the owner and holder thereof, the said A——— B——— being required so to do, executes and files in the papers of this cause a bond payable to said C——— D——— in the penalty of ——— dollars, with E——— F——— and G——— H——— as sureties, conditioned to save harmless and indemnify the said C——— D——— against all claims by any other person on account of said note, and against all costs and expenses by reason of such claims, which bond, being found to be in a sufficient penalty, in proper form, and with sufficient security, is now here in open court approved.

It is, therefore, adjudged, ordered and decreed that said plaintiff do recover of and from the said defendant, C——— D———, the said sum of ——— dollars, with legal interest

27 S. E. 246; Scraggs v. Hill, 43 W. Va. 162, 27 S. E. 310; McGlaughlin v. McGraw, 44 W. Va. 715, 30 S. E. 64; Dellinger v. Foltz, 93 Va. 729, 25 S. E. 998.

thereon until paid, and his costs in and about the prosecution of his suit in this behalf expended.[91]

No. 408.

§ 1276. Declaring a deed to be a mortgage.

[*After the title of the cause and proper recitals continue as follows:*] And it appearing to the satisfaction of the court that the said conveyance, bearing date on the ——— day of ———. 19—, executed by the plaintiff to the defendant, a copy of which is filed as "Exhibit B" with the plaintiff's said bill, and purporting to be a deed, was made, signed and delivered by the said plaintiff to the said defendant to secure to the said defendant, C——— D———, the sum of ——— dollars, and was designed and intended both by the said A——— B——— and the said C——— D——— to be a mortgage, securing said sum of ——— dollars, it is therefore adjudged, ordered and decreed that the said writing, purporting to be a deed, bearing date on the ——— day of ———, 19—, as aforesaid, and executed by the said A——— B——— to the said C——— D——— be, and the same is hereby declared to be a mortgage, and that the said tract of land therein mentioned and described be regarded as so standing as a security for the said sum of ——— dollars due and payable by the said A——— B——— to the said C——— D———, which now amounts, including the interest to date, to the sum of ——— dollars. And it is further adjudged, ordered and decreed that the said sum of ——— dollars, principal and interest to date, constitutes a valid and subsisting lien upon the real estate embodied and described in the said writing bearing date as aforesaid. And it is further adjudged, ordered and decreed that, upon the payment of the said sum of ——— dollars, above named to the said C——— D——— by the said A——— B———, or some one for him, then the said C———

[91] See Truly v. Lane, 7 Smedes & M. (Miss.) 325, 45 Am. Dec. 305, and note.

D——— shall make an apt and sufficient deed with covenants of general warranty, reconveying the said land to the said A——— B———, and in default thereof that then R——— R———, who is hereby appointed a special commissioner for that purpose, shall make, acknowledge and deliver for record such deed, for and on behalf and in the name of the said C——— D———, for which the said R——— R——— shall be allowed the sum of five dollars, to be taxed as part of the costs of this suit. [*Proceed with the decree by requiring the plaintiff to pay the sum of money constituting the loan or debt within a reasonable time to be prescribed in the decree, and in default of such payment directing a special commissioner to make sale, prescribing the terms, etc., as in any other ordinary decree of sale of real estate. Give a decree for costs for A——— B——— in the foregoing decree in favor of the plaintiff, as he is the party substantially prevailing in the suit.*][92]

No. 409.

§ 1277. Authorizing mortgage on lands of infant by his guardian.

[*As in No. 387 mutatis mutandis to the * and then as follows:*] that the petitioner be allowed to borrow on the faith and credit of the said real estate the sum of ——— dollars, for the purpose of making improvements upon the said real estate, and to secure the same, the lands of the said petitioner mentioned and described shall be encumbered by mortgage; and the said A. B., guardian of the said C. D., is hereby directed to ascertain the rate of interest and the time for which he can borrow said amount, and report the same to this court.[93]

[92] The foregoing form is based upon the cases of Lawrence v. Du Bois, 16 W. Va. 443; Davis v. Demming, 12 W. Va. 246, 293, 294, etc.

[93] If the guardian has really ascertained whether or not he can borrow the money and the rate of interest, the facts may be so stated in the petition and thus avoid delay and the necessity of a report of this matter to the court. This method is advisable when it can be conveniently done.

No. 410.

§ 1278. Confirming report of guardian as to borrowing money and authorizing the execution of a mortgage.

[*After the style of the case as in No. 387.*]

This cause again came on further to be heard upon the papers formerly read herein; upon the former orders and decrees made and entered therein; upon the report of said guardian, A. B., as to the amount of money that may be borrowed in this proceeding and the rate of interest to be paid thereon; and was argued by counsel. Upon consideration whereof, there being no exceptions to said report, and the court perceiving no just grounds of exceptions thereto, the said report is hereby ratified and confirmed.

And it appearing from said report that the sum of ——— dollars can be borrowed for the term of ——— years, with interest at the rate of ——— per cent. per annum, the court doth find that said terms are satisfactory and they are hereby accepted and confirmed; and it is hereby adjudged, ordered and decreed that said guardian be and he is hereby authorized and directed to execute a note for said amount, and to secure the same he shall execute a mortgage on the lands hereinbefore in the bill and proceedings mentioned and described, for that purpose; and it is further adjudged, ordered and decreed that the said guardian shall use the money realized by such loan for the purpose of [*here state in detail how the money shall be expended*]; and the said guardian shall report his proceedings with reference to the execution of said mortgage, and the expenditures of said money as herein directed to a future term of this court.

All of which is adjudged, ordered and decreed accordingly.

No. 411.

§ 1279. Appointing commissioners to make partition of real estate, and directing manner of partition.

[*After the style of the suit, and the proper recitals.*]

Upon consideration of which the court is of opinion and doth so adjudge, order and decree, that the parties to this suit are the owners in common in fee of the land in the bill and proceedings mentioned and described; and the court is further of opinion to and doth hereby decree that partition be made of the said real estate in the said bill and proceedings mentioned and described; and that in making partition thereof the said real estate be so partitioned and divided that the defendant, E——— L——— N———, shall receive as his share the three-fifths part thereof, and that the plaintiffs, V——— C——— S——— and E——— S——— N———, each receive as her share the one-fifth thereof.

And it is further adjudged, ordered and decreed that the commissioners hereinafter appointed in making partition of the said real estate do lay off and assign, by proper metes and bounds, the shares of said V——— C——— S——— and E——— S——— N——— together, assigning the residue of the tract, in like manner, to the defendant, E——— L——— N———, if partition of the said real estate can properly be made in that way.

And it is further adjudged, ordered and decreed, and the commissioners hereafter appointed are hereby so instructed, that, if it should appear that permanent and valuable improvements have been made upon the said land by either or any of the coparceners, the part so improved, if it can be done without injury to the others, be assigned to the improver thereof, without charging either or any of said coparceners with the costs or value of such improvements.

And for the purpose of making said partition the court doth hereby appoint ———, any ——— of whom may act.

And it is further adjudged, ordered and decreed that, before the said commissioners or any of them shall proceed to dis-

charge their duties as such commissioners, they, and each of them, shall take an oath faithfully and impartially to make partition of the real estate in this cause in accordance with the terms and requirements of this decree, and shall give due notice to all persons interested of the time of making such partition; and they shall return a report of what they shall do under this decree as such commissioners to a future term of this court, accompanying the same with a description, by proper metes and bounds, of the respective parcels allotted the coparceners entitled to share in the partition of said real estate, together with all evidence which may be taken before them pertaining to the matter of said partition, and plats and deeds used, read and made in connection therewith.

And it is further adjudged, ordered and decreed that, if the said commissioners shall determine that the said property is not susceptible of partition, they shall so report to this court, setting forth in such report the facts upon which they base their conclusion with reference thereto.

All of which is adjudged, ordered and decreed accordingly.[94]

No. 412.

§ 1280. Confirming report of commissioners in making partition of the real estate.

[*After the style of the suit.*]

This cause came on again this day to be heard upon the papers formerly read herein; upon the former orders and decrees made and entered therein; upon the report of M. H., F. F. and W. W., the special commissioners heretofore appointed to make partition of the lands in the bill and proceedings mentioned; and was argued by counsel. And there being no exceptions to said report and the court perceiving no just grounds of exception thereto, the said report and partition therein shown, are hereby ratified and confirmed.

[94] See Dingess v. Marcum, 41 W. Va. 757, 24 S. E. 624.

And it appearing from said report that there was allotted and assigned of the said lands to A. B. the following tract designated as lot No. 1, bounded and described as follows: [*here set out the descriptions by metes and bounds*]. It is therefore adjudged, ordered and decreed that the said A. B. do take and hold in severalty and in fee the said land described as aforesaid. And it further appearing from said report that there was allotted and assigned to C. D. out of said land the following piece or parcel of land known as lot No. 2, and bounded and described as follows: [*here set forth the description by proper metes and bounds*]. It is also adjudged, ordered and decreed that the said C. D. do take and hold the said lot No. 2, in severalty and in fee as hereinbefore described. [*Here continue to set forth the various lots, numbering them properly and giving their metes and bounds until each has received his share. If there be rights of way allotted by the report of the commissioners, set them out by proper description so that they may be correctly located as intended by the commissioners making partition.*]

And that the parties may have their various deeds duly entered of record, being minors and incapable of executing deeds among and to each other, it is therefore adjudged, ordered and decreed that J. M. R. be, and he is hereby appointed, a special commissioner, directed and empowered to execute separate deeds to each of the said parties above named by proper metes and bounds with covenants of special warranty, to be by him duly acknowledged and delivered to the clerk of the county court of this county for record, for which the said special commissioner shall be allowed the sum of five dollars for each deed so executed by him, to be taxed as part of the costs in this cause.

It is further adjudged, ordered and decreed that the costs of this suit be borne equally by all the parties, they being tenants in common and equally interested with reference to the partition and the costs attendant thereon.

No. 413.

§ 1281. Confirming commissioner's report in creditors' suit to enforce judgment liens, and appointing special commissioner to sell land.

[*After the style of the suit.*]

This cause came on again this day further to be heard upon the papers heretofore read therein; upon the former orders and decrees entered therein; upon all the former proceedings had in said cause; upon the report of the commissioner in chancery, L——— D——— J———, to whom this cause was heretofore referred to take an account of the real estate owned by the defendant, C——— D———, and the liens existing thereon and their respective priorities, and was argued by counsel. And there being no exception to said report, and the court perceiving no just ground of exception thereto, the same is hereby ratified and confirmed.*

And as from said report it doth appear, the court doth adjudge, order and decree that the said C——— D——— is the owner of the following real estate situate in the district of ———, county of ———, and state of ———, consisting of two tracts, the first of which contains ——— acres, and is fully described in said report, and the other of which contains ——— acres, and is likewise described in said report.

And as from said report it doth also appear, it is further adjudged, ordered and decreed that the following are the liens and the order of their priority against the said real estate:

First. The judgment in favor of I——— L——— for ——— dollars, obtained in the ——— court of ——— county, in said state, on the ——— day of ———, 19—, which now amounts, including the interest thereon, to ——— dollars, and ——— dollars costs adjudged in the action in which said judgment was rendered.

Second. The judgment in favor of M——— W——— [*here describe same*].

Third. [*Here describe third lien, and so on until all the liens are thus set forth in the decree.*]

It is further adjudged, ordered and decreed that the said C——— D——— do, within thirty days from the rising of this court, pay unto the said I——— L———, M——— W——— [*naming all the lienholders*], their said lien debts and judgments respectively, as hereinbefore ascertained and adjudicated, with interest thereon from this date until paid, with costs in the respective actions in which said judgments were rendered, and the costs of this suit; and in default of such payment, it is further adjudged, ordered and decreed that said real estate be sold, or so much thereof as may be necessary, to pay off and discharge all of the said lien debts and judgments and costs, according to their respective priorities as hereinbefore ascertained and adjudicated, and the costs of this suit, at public auction to the highest bidder, at the front door of the court house of this county, upon the following terms, to-wit: [*here set out the terms of sale*].

And for the purpose of making said sale, it is adjudged, ordered and decreed that C——— J——— H——— be, and he is hereby, appointed a special commissioner, who shall, before making such sale, advertise the time, terms and place thereof for four successive weeks in the ———, a newspaper published in said county, and by posting a notice thereof for a like period at the front door of the court house of said county, and shall give bond in the penalty of ——— dollars with good security before the clerk of this court, conditioned for the faithful performance of his duties as such commissioner, and to account for and pay over all moneys which may come into his hands by virtue of his appointment as such commissioner, and what he shall do hereunder he shall report to the next term of this court.

No. 414.

§ 1282. Filing cross-bill and appointing receiver, as therein prayed for.

[*After the style of the cause.*]

Upon a cross-bill filed in the above entitled cause.

This day came the said J——— F——— V——— upon leave of the court first had and obtained for the purpose, and filed here in open court his cross-bill in the above cause, and upon his motion and in conformity to the prayer of the said cross-bill, it is adjudged, ordered and decreed that B——— F——— M———, the sheriff of the county of R———, who is hereby appointed a special receiver for that purpose, is hereby authorized to take into his possession and control the oil now on hand heretofore produced or hereafter to be produced from the said well in said cross-bill mentioned and safely to keep the same, subject to the further order of the court; and that he do at such times as in his judgment shall be necessary or for the advantage of the parties interested, proceed to sell said oils, or so much thereof as he may deem proper, on the best terms he can, either on credit or for cash, and out of the proceeds of such sale, he do pay the expenses of running said well and transporting and marketing said oil, and retain the residue thereof subject to the further order of the court; and in case the said special receiver shall sell any of the said oil upon credit, he is required to take negotiable paper therefor, with good security, payable at a time or times certain not to extend beyond the next regular term of this court. Before entering upon his duties as such special receiver, the said B——— F——— M——— shall file with the clerk of this court bond, with security to be approved by said clerk in the penalty of ——— dollars, conditioned for the faithful discharge of the duties of his said office, and said cross-bill is sent to rules, and the plaintiff has leave to sue out proper process thereon.[95]

No. 415.

§ 1283. Appointing receiver to rent real estate.

[*After the style of the suit.*]

This day the plaintiff in the above styled cause, having given due notice of this motion, moved the court for the appointment

[95] The above form is taken from W. Va. O. & O. L. Co. v. Vinal, 14 W. Va. 654, 655.

of a receiver, and supported his said motion by affidavits, which were replied to by counter-affidavits; and after considering the said application the court, on this the ——— day of ———, 19—, hereby appoints W——— J——— C——— special receiver in the above cause, who is hereby authorized and required, after giving bond in the penalty of ——— dollars, conditioned for the faithful performance of his duties, to take charge of the real estate and farm in the bill and proceedings in this cause mentioned and described, and to rent out the same for the period ending on the ——— day of ———, 19—, upon the following terms: [*here set forth the terms*]; and the defendant, B——— H———, is hereby directed and required to deliver possession of the said real estate to the said receiver. All of which is adjudged, ordered and decreed accordingly.[96]

No. 416.

§ 1284. Appointing receiver in vacation—General form.

A——— B———
v. } In Chancery.
C——— D———.

Pending in the Circuit Court of ——— County, and State of ———.

This day the plaintiff, by counsel, moved the undersigned judge of said court in the vacation thereof to appoint a special receiver of the personal property in the bill and proceedings in this cause mentioned and described. And the court being satisfied from the bill and exhibits, and affidavits filed herein of A——— B——— and W——— R———, that a proper case

[96] Dunlap v. Hedges, 35 W. Va. 293, 13 S. E. 656; Smith v. Butcher, 28 Gratt. (Va.) 144.

Pending a chancery suit to subject the defendant's real estate to the discharge of liens thereon, the court has a discretion to sequester the rents and profits of said real estate, and appoint a receiver for the same. Grantham v. Lucas, 15 W. Va. 425; Smith v. Butcher, *supra*. For the general principles relating to the appointment and duties of a receiver, see Hogg, Eq. Princ., §§ 137-148.

for the appointment of a receiver has been thus shown, and reasonable notice of this application having been given to said C——— D———, it is hereby adjudged, ordered and decreed that R——— O——— C——— be, and he is hereby, appointed a special receiver for said property, and is authorized to take possession thereof, and sell said property in bulk or at retail, as in his discretion may seem proper, after an inventory thereof has been first taken by two disinterested persons. But before said special commissioner shall act under this decree he shall give bond with sufficient security to be approved by the clerk of this court, in the penalty of ——— dollars, conditioned for the faithful performance of his duties as such receiver.

[*Here an order of injunction may be added if the case should require it, as presented by the bill, enjoining the defendant from interfering with the property or attempting to make disposition thereof.*]

F——— A——— G———,
Judge of Circuit Court of ———
County, and State of ———.

The clerk of said court will enter the above as a vacation order as of the date of the ——— day of ———, 19—.

F——— A——— G———.[97]

No. 417.

§ 1285. Of sale in a suit where the property of principal and surety may be sold.

[*After style of suit and proper recitals.*]

And there being no exceptions to the report of commissioner J——— B———, and the court perceiving no just ground of exception thereto, it is therefore adjudged, ordered and decreed that said report be, and the same is hereby, ratified and confirmed. And it appearing from such report that the defendant, E——— F———, the joint judgment debtor with G———

[97] See note to § 1283; Krohn v. Weinberger, 47 W. Va. 127, 34 S. E., at p. 748.

H———, is only a surety to the said G——— H———, it is further adjudged, ordered and decreed that the special commissioner hereinafter appointed to make sale of the property in the bill and proceedings mentioned shall first offer for sale the property of the said G——— H———, the principal judgment debtor; and if the proceeds thereof shall be sufficient to pay off and discharge the costs of this suit, and the liens hereinafter ascertained, then sale shall not be made of the real estate of the said E——— F———; but if the proceeds of such sale be not sufficient for that purpose, that the lands of the said E——— F———, or so much thereof as may be necessary to pay the residue of such costs and judgment liens, shall be sold by the said special commissioner. [*Continue the decree mutatis mutandis, as indicated in No. 413, from the* *.] [98]

No. 418.

§ 1286. Of sale against lands of decedent.

[*After the style of the suit and proper recitals, proceed as follows:*] And there being no exception to the report of commissioner J——— H———, to whom this cause was referred by a former decree herein, and the court perceiving no just ground of exception to said report, the same is ratified and confirmed. And it appearing from said report that there is now in the hands of E——— F———, the personal representative of the decedent, C——— D———, the sum of ——— dollars, available personal assets of the estate of said C——— D——— to apply upon the payment of his debts, it is therefore adjudged, ordered and decreed that the said sum of ——— dollars be and the same is hereby applied to the payment, *pro rata*, of the following debts: [*here specify the said debts*].

And it further appearing from said report that there is no other personal property or personal assets available for the payment of the debts of the said decedent, it is adjudged, ordered and decreed that the real estate of the said decedent, or

[98] See Ewing v. Ferguson, 33 Gratt. (Va.) 548; Dillard v. Krise, 86 Va. 410, 10 S. E. 430.

so much thereof as may be necessary, be taken and treated as assets, and be applied to the discharge of the indebtedness of the said decedent above named.

And from said report it further appears that the said decedent died the owner in fee simple of the following estate: [*here describe the same*].

And it further appears from said report that the first liens on said real estate, and of equal dignity with each other, are the following: [*set forth the names of the persons holding the liens, the nature thereof, their dates and respective amounts*]; and that the said liens are valid and subsisting liens upon the said real estate, and are the first liens thereon.

And it further appears from said report that the second lien upon said real estate [*here describe the lien, by giving the name of the party holding it, the date and amount*].

And it further appears from said report that the third lien upon said real estate [*here give the name of the lienholder, and nature thereof, and the amount*].

It is therefore adjudged, ordered and decreed that the personal representative of the said decedent or the said [*here naming the defendants*] heirs at law of the said decedent do pay unto the said [*here name all of the liens, amounts, etc., particularly specifying the same*], within ——— days from the rising of this court, and in default thereof that said lands be sold, or so much thereof as may be necessary, to pay off and discharge the said liens and the costs of this suit; and for the purpose of making said sale, L——— J——— is hereby appointed a special commissioner, who shall advertise the time, terms and place of such sale for four successive weeks in some newspaper published in this county, and by publishing notice thereof for a like period at the front door of the court house of this county; said sale to be upon the following terms: [*here set forth the terms*].

[*Here conclude by requiring bond of the commissioner, and directing him to report at a future term of the court, as indicated in No. 413.*] [99]

[99] Daingerfield v. Smith, 83 Va. 81, 1 S. E. 599.

No. 419.

§ 1287. For the specific performance of a contract for the sale of real estate.

[*After the style of the suit and the usual recitals.*]

Upon consideration whereof the court is of opinion that the plaintiff is entitled to the relief prayed for in his said bill, inasmuch as it fully appears to the court that the contract and agreement in the bill and proceedings mentioned has been duly proved, that the matters embodied in said contract may be fully performed and executed on the part of the said defendant, and that the said plaintiff is entitled to have the same enforced. It is therefore adjudged, ordered and decreed that the said defendant, C——— D———, do execute a good and sufficient deed, conveying to the plaintiff, A——— B———, with general warranty and the usual covenants of title, the land in the bill and proceedings mentioned, according to the metes and bounds in the said contract and agreement laid down and set forth, bearing date on the ——— day of ———, 19—, and filed as "Exhibit A" with plaintiff's bill. And it is further adjudged, ordered and decreed that the said C——— D——— do make, acknowledge and deliver to the said plaintiff such deed within ——— days from the adjournment of this court, and in default thereof that then R——— L———, who is hereby appointed a special commissioner for that purpose, and duly empowered thereto, do execute and deliver for record to the plaintiff, A——— B———, said deed, conveying said land, for which he shall be allowed a fee of five dollars to be taxed as part of the costs of this suit; and it is further adjudged, ordered and decreed that the plaintiff do recover of and from the defendant his costs, in and about the prosecution of his suit in this behalf expended, including a statute fee of twenty dollars.[100]

[100] See Sands, Suit in Equity (2nd Ed.), 590; Seton on Decrees, 644, 668; Ambrous Heirs v. Kellar, 22 Gratt. (Va.) 778. For a general consideration of the law of specific performance, see Hogg, Eq. Princ., §§ 396-410.

No. 420.

§ 1288. For specific performance after the writing has been reformed.

[*After the style of the suit and the proper recitals.*]

Upon consideration whereof it is adjudged, ordered and decreed that the agreement signed by N——— P——— and J——— E———, bearing date on the ——— day of ———, 19—, a copy of which is filed with the plaintiff's bill as "Exhibit A," be and the same is hereby reformed by the insertion of the words "for the term of ninety-nine years, renewable forever," after the word "lease" [*in the first line of said agreement*], so that the same will read as if originally written, "We hereby agree to lease for the term of ninety-nine years, renewable forever, to M——— M———, trustee," etc.

And it is further adjudged, ordered and decreed that the plaintiff is entitled to relief in and to specific performance of the said agreement to lease as aforesaid reformed, and that the defendants do, and they are hereby directed and required to, accept and to join in the execution and acknowledgment of a lease, to be duly executed, acknowledged and tendered to them by the plaintiff, of the property described in plaintiff's bill, a copy of which is therewith filed as an exhibit, for the term of ninety-nine years, beginning on the ——— day of ———, 19—, and containing all the covenants and provisions set forth and contained in said "Exhibit A," excepting only the covenant or stipulation for the purchase or conveyance of the reversion in fee of the said premises before the ——— day of ———, 19—. upon certain terms in said "Exhibit A" expressed, the period for the performance or execution of the same having already gone by, said lease to be executed with the consent of F——— C——— Y———, to be attested by his signature to the same, and that the defendants, E——— H——— C——— and R——— B———, administrators of J——— E———, be required only to enter into such covenants and stipulations in the case as will bind the estate of the said J——— E——— in all particulars, and not themselves personally.

And inasmuch as it appears that there is a large amount of rent in arrear to the plaintiff, it is accordingly further adjudged, ordered and decreed that this cause be continued until the next term of this court, in order to enable the plaintiff to obtain further evidence touching the amount of rents so in arrear, and that the cause be then determined on the evidence now already in the cause, together with such other demands as may be hereafter put in.[101]

No. 421.

§ 1289. Upon the verdict of a jury upon an issue out of chancery.

[*After the style of the suit.*]

This cause came on this day further to be heard upon the papers heretofore read in this cause; upon the former orders and decrees entered therein; upon the verdict of the jury rendered upon the issue heretofore directed in this cause and now filed herein; and upon the argument of counsel.

And it now appearing to the satisfaction of the court that the land in the bill and proceedings mentioned and described, conveyed by J——— B———, the father of the plaintiffs named in the bill, to the defendant, C——— D———, was to be by him, the said C——— D———, taken and held in trust for the children and heirs at law of the said J——— B———, the plaintiffs named in the bill in this cause, it is therefore adjudged, ordered and decreed that the said C——— D——— be and he is hereby declared to hold the said land in trust for the said plaintiffs; that the said children are the real and substantial owners thereof, and are now entitled to hold the same in fee simple. [*Proceed further in the decree by requiring conveyance of the title from said C——— D——— to the plaintiffs; directing an issue for an action for the rents, issues and profits*

101 The foregoing form will be found in Thornton, Ind. Prac. Forms, 1555, 1556.

of the land on the part of the said C——— D———, and making any further or other provisions that may be necessary to complete the relief.]

No. 422.

§ 1290. Upon verdict of jury devisavit vel non finding for the will.

[*After the style of the suit.*]

This cause came on this day further to be heard upon the papers heretofore read therein; upon the former orders and decrees made and entered therein; upon the verdict of the jury upon the issue *devisavit vel non*, heretofore awarded in this cause, and now filed in the papers hereof; and upon the argument of counsel.

And it appearing from the said verdict that the paper writing probated in the county court of ——— county, in the state of ———, on the ——— day of ———, 19—, was and is the will of J——— J——— W———, deceased, it is therefore adjudged, ordered and decreed that the said paper writing in the bill and proceedings mentioned and described, a copy of which is filed with the plaintiff's bill as "Exhibit A," and probated in the county court of ——— county, and state of ———, on the ——— day of ———, 19—, be adjudged to be and is the true last will and testament of the said J——— J——— W———, deceased; that the probate thereof is hereby approved as true, and the said will be solemnly declared to be duly probated.

And it is further adjudged, ordered and decreed that the defendants in this suit do recover of and from the plaintiffs, contestants of the said will, their costs in and about their defense of the said will in this behalf expended, including a statute fee of ——— dollars.

No. 423.

§ 1291. Upon a verdict of jury on an issue devisavit vel non finding against the will.

[*After the style of the suit.*]

This cause came on this day to be heard upon the plaintiff's bill; and answer of the defendants thereto, and general replication to said answer; and the court having heretofore directed an issue at law to be tried by a jury at the bar of this court to try and determine whether the writing referred to in the pleadings, and purporting to be the last will and testament of E——— F———, deceased, is the last will and testament of the said E——— F———, deceased, or whether any part thereof is such last will and testament; and the jury, to-wit, L——— M———, and eleven other good and lawful men, having been selected and sworn to try the said issue; and the said jury having heard the evidence of the respective parties, and the argument of counsel thereon in open court, and under the direction of the court, and having found by their verdict that the said writing probated in the office of the clerk of the county court of the county of ———, and state of ———, and bearing date on the ——— day of ———, 19—, is not the last will and testament of the said E——— F———, deceased, nor is any part thereof the last will and testament of the said E——— F———, deceased; that the said E——— F———, at the time of the execution and attestation of the said writing was not of sound and disposing mind and memory; and that the said paper writing was not the free and voluntary act of the said E——— F——— at the time of its execution, but was the result of undue influence exerted upon him at the time said writing was made, whereby the free agency of the said E——— F——— was destroyed; and the defendants having interposed a motion to set the said verdict aside and for a new trial; the court, having heard the grounds and argument of counsel in support thereof, and being fully advised in the premises, doth hereby overrule the said motion.

It is, therefore, adjudged, ordered and decreed that the said paper writing, probated in the office of the clerk of the county court of the county of ———, and state of ———, on the ——— day of ———, bearing date on the ——— day of ———, 19—, and purporting to be the last will and testament of the said E——— F———, deceased, is not, nor is any part thereof, the true last will and testament of the said E——— F———, deceased; and that the probate thereof in the office of the clerk of the county court of said county, and the proceedings thereunder, be and the same are hereby set aside, and the same are hereby declared to be null and void.

It is further adjudged, ordered and decreed that the defendants [*naming them*] do pay unto the plaintiffs their costs in and about the prosecution of their contest in this behalf expended.[102]

No. 424.

§ 1292. Setting up a lost will.

[*After the style of the suit.*]

This day Honorable F——— A——— G———, the judge of this court, vacated the bench because of being disqualified from sitting in this cause, and thereupon Honorable W——— R——— G———, a practicing attorney of this court, heretofore duly elected a special judge to try and determine the matters in controversy in this suit, again went upon the bench. And now, this cause coming on to be finally heard upon the former orders and decrees herein made and entered; upon the process duly served upon the home defendants, and the order of publication duly executed as to the non-resident defendants and the unknown heirs at law of J——— J——— W———, deceased; upon the proper orders and proceedings duly entered and had at rules; upon the bill and amended bill, the separate

102 The above form is taken from one found in Puterbaugh, Ch. Pl. and Pr. (3rd Ed.), 676, 677; and from the substantial parts of the one appearing in the record of Dower v. Church, 21 W. Va. 23.

answer of A——— M———, and the general replication thereto, the joint and several answers of E——— S——— and J——— S——— S———, her husband, C——— W———, H——— W———, G——— B——— R———, C——— S———. C——— R——— and J——— B——— and the plaintiffs' replication in writing thereto; upon the separate answer of J——— M——— and general replication thereto; upon the joint and several rejoinder of E——— S——— and J——— S——— S———, her husband, C——— W———, H——— W———, G——— B——— R———, C——— S———, C——— R——— and J——— B——— to the replication in writing of the plaintiffs; upon the bill taken for confessed and set for hearing as to all home defendants failing to plead, answer or demur to the bill or amended bill of complainants; upon the depositions taken and filed in the cause; upon the plaintiffs' suggestion of the death of the defendant, J——— M——— S———, and, they asking that the suit abate as to him, the said suit is hereby abated as to him, the said J——— M——— S———; and neither the plaintiffs nor defendants asking an issue to be directed in this cause, but submitting the decision of all matters arising upon the record to the court, after argument of counsel for both plaintiffs and defendants and a careful examination of the papers in the cause, the court is of opinion and doth so adjudge, order and decree that in the year 19—, as set out in the plaintiffs' original bill, the decedent, J——— J——— W———, being of sound mind and memory, did make and publish his last will and testament in writing, to which he subscribed his name as and for his last will and testament in the presence of R——— S——— and W——— D———, the said R——— S——— and W——— D——— also subscribing their names to said writing as witnesses thereto at the request of said J——— J——— W———, deceased, in his (the said testator's) presence, and they, the said witnesses, subscribing their names thereto as witnesses in the presence of each other, and that said last will and testament was in existence at the time of the death of said testator.

And the court doth further find that since the death of said testator, said J——— J——— W———, said last will and testament, so made in writing and published by him as hereinbefore ascertained and adjudged, has been destroyed by burning, and that its contents can be established only by parol evidence, and the plaintiffs so desiring it, the court doth find from the pleadings and proofs in this cause, and doth so adjudge, order and decree, that the said will doth contain the following devises and bequests and none others:

First. After the payment of all the testator's just debts and funeral expenses, he, the said J——— J——— W———, by said last will and testament, devised and bequeathed all his estate, both real and personal, to his wife, A——— W———, for and during her natural life.

Second. After the death of his said wife, A——— W———, he, the said J——— J——— W———, by said last will and testament, devised and bequeathed all the remainder of his estate, both real and personal, to the plaintiffs, T——— D——— and A——— E——— C———, and their heirs forever, in equal moieties, viz: one-half of said remainder after the termination of the life estate of said A——— W——— to said T——— D——— and her heirs forever, and the other one-half of said remainder after the termination of the life estate of said A——— W——— to the said A——— E——— C——— and her heirs forever.

Third. And the said testator, the said J——— J——— W———, nominated by his said last will and testament the said A——— W——— as his executrix, desiring that she be not required to give any bond in qualifying as such executrix.

And the court doth adjudge, order and decree that a certified copy of this decree be made out by the clerk of this court and by him transmitted to the clerk of the county court of this county to be by him, the said clerk of the county court, duly recorded as and for the last will and testament of said J——— J——— W———, deceased, with leave to the proper person to qualify thereunder as the personal representative of said testa-

tor. And it is further adjudged, ordered and decreed that the plaintiffs do recover of the defendants their costs in this behalf expended, including a statute fee of $——— (——— dollars), and leave is hereby given to sue out execution therefor if they or any of them may so elect.

And the defendants desiring to appeal from this decree, it is ordered that the same be suspended for ——— days from the rising of this court; but this order of suspension is to be of no effect until the defendants, or some of them, shall enter into bond with good security before the clerk of this court, in the penalty of $——— (——— dollars), conditioned to pay all the costs and damages that may be sustained by any one by reason of the suspension of this decree should no appeal and supersedeas be allowed thereto by the Supreme Court of Appeals of this state within the time aforesaid.

The defendants moved the court to exclude the deposition of A——— S———, which the court refused to do, but declined to consider so much of it, as relates to communications had between her and her husband, J——— J——— W———.[103]

No. 425.

§ 1293. For the construction of a will.

[*After the style of the cause.*]

This day came the plaintiffs, by their counsel, and filed their bill; and the defendants appeared, by counsel, and filed their answers; to which the plaintiffs, by counsel, reply generally. Whereupon, this cause being docketed by consent of parties, by counsel, the same came on to be heard by like consent, on the bill, answers, with replications and exhibits filed, and was argued by counsel.

On consideration whereof, the court is of opinion, and doth adjudge and decree, that according to the true construction of the will of J——— D——— M———, deceased, the trustees

[103] This form is taken from the one found in the record of Dower v. Seeds, 28 W. Va. 113, 57 Am. Rep. 646.

thereby contemplated for the benefit of his granddaughters have power, from time to time, to change the investment of the trust subject; that the sum mentioned in the bill, of ——— dollars, with legal interest thereon, from the ——— day of ———, 19—, is a part of that trust subject; and that, if the complainants, J——— B——— M——— and D——— M———, had been duly appointed trustees, for the benefit of J——— M———, as well as the other granddaughters of the testator, they might lawfully require payment of the same from the defendant, and he would not be bound to supervise their acts or see to the application of the trust fund, or incur any danger from such payment, other than that (if any) which may arise from the accident of the loss of the bond. Wherefore the court doth adjudge, order and decree as follows:

First. That the said J——— B——— M——— and D——— M———, be, and they are, hereby appointed joint trustees for the said S——— M———, jointly with the other granddaughters of the said J——— D——— M———, deceased, under his will, and that they be, and are, hereby invested with all the power, authority and discretion which the said will would have conferred on them, had they been expressly named as trustees in the said will; and that all their actings and doings, assuming to act as trustees for the said S——— M——— jointly with the other granddaughters aforesaid, so far as the same have been within the limits of their authority as such trustees, for such other granddaughters, do stand approved and confirmed in the same manner, and to the same extent as if they had been previously appointed trustees for the said S——— M———, by a court of competent jurisdiction, and in a proceeding to which she was a party; and that the said trustees be, and they are, hereby required, before proceeding to execute said trust, to enter into bond, in the office of the clerk of this court, with good and sufficient security, in the penalty of ——— dollars, conditioned for the faithful performance of their duties as such trustees, for all the said granddaughters of the said J——— D——— M———, deceased.

Second. That the defendant, C——— R———, do pay unto the ——— bank, to the credit of this cause, subject to the order of this court, the said sum of ——— dollars, with legal interest thereon from the said ——— day of ———, 19—, until such payment.

Third. That the complainant, D——— M———, and the defendant, H——— W——— M———, do execute a deed of release, referring to this decree, and releasing and reconveying unto the said defendant, C——— R———, the property conveyed by the deed made the ——— day of ———, 19—, and admitted to record in the office of the clerk of the ——— county court, on the ——— day of ———, 19—, between the said C——— R——— and M——— S———, his wife, of the first part, and D——— M——— and H——— W——— M———, of the second part, and J——— D——— M———, of the third part, and acknowledge said deed, so that it may be duly admitted to record; and when said deed shall be delivered to the said R———, or to the clerk of this court for him, and the fact of such delivery certified, by whichever of them shall receive the same upon an official copy of this decree, that then the said J——— B——— M——— and D——— M———, as trustees for the granddaughters of the said J——— D——— M———, deceased, be, and they are hereby, authorized to check on the ——— bank, on an attested copy of this decree, for the money above directed to be deposited therein to the credit of this cause.

Fourth. That the parties respectively have leave to apply hereafter to this court for any other or further order that may be necessary to carry out and fulfill the foregoing decree, and that the said parties who are adults respectively pay their own costs of this suit.[104]

[104] The above form is taken from Matthews, Forms, 239-241.

CHAPTER LII

MISCELLANEOUS FORMS

§ 1294. Notice of *lis pendens*.
§ 1295. Exceptions to delivery bond taken by the officer levying an attachment.
§ 1296. Notice of motion under Virginia statutes to quash an attachment in vacation.
§ 1297. Affidavit to require plaintiff to elect whether she will proceed at law or in equity in one of two suits for the same cause, one pending in equity, the other at law
§ 1298. Order presenting affidavit and making motion to require plaintiff to elect whether she will proceed at law or in equity in one of two suits for the same cause, one pending in equity, the other at law.
§ 1299 Of verdict on intervention in attachment
§ 1300 Bill by committee of lunatic to sell lands of the latter, setting out specific bids made for the same
§ 1301 Decree in divorce suit restoring plaintiff to maiden name.
§ 1302 Decree against personal representative of the estate of a decedent.
§ 1303. Decree directing issue to determine question of fraud and mental incapacity.
§ 1304. Order dismissing bill for plaintiff's failure to give security for costs.
§ 1305. Order for leave to file a bill of review.
§ 1306. Caption for decree or order, with title of cause.
§ 1307. General form of an order.
§ 1308. General form of a decree
§ 1309 The recitals of a decree.
§ 1310 Order for revival of suit.
§ 1311 Final decree for dissolution of partnership, and confirming report made in the cause.
§ 1312. Order making petitioner party to the suit.
§ 1313. Decree for partition and dower, and appointing commissioners to assign dower and make partition in same case.
§ 1314. Of exceptions to a deposition as an entirety.
§ 1315 Of exceptions to certain parts of a deposition.
§ 1316. Of injunction bond
§ 1317 Of bond of injunction to judgment at law
§ 1318 Of order removing cause to another county because improper for judge to preside at the trial.

§ 1319. Order awarding injunction restraining and inhibiting laborers and members of labor organizations from molesting the plaintiff in the conduct of his business.
§ 1320. Form of petition for an attachment for disobeying an injunction.
§ 1321. Form of order to show cause why an attachment should not issue for disobeying an injunction order.
§ 1322. Form of an answer to a rule to show cause why a party should not be attached for contempt.
§ 1323. Form of order dismissing suit agreed.
§ 1324. Form of an order requiring plaintiff to elect whether he will proceed at law or in equity.
§ 1325. Form of instrument making election to proceed in equity when action at law and suit in equity pending for same cause.
§ 1326. Short form of decree on an issue out of chancery entered upon the verdict of the jury.
§ 1327. Caption of depositions, examination of witnesses, adjournment and attestation.
§ 1328. Form of affidavit authorizing an order of publication against a corporation which has failed to comply with section 24, chapter 54, of the Code of West Virginia.
§ 1329. Form of order of publication where corporation has failed to comply with section 24, chapter 54, of the Code of West Virginia.
§ 1330. Form of order made in vacation directing the payment of alimony, *pendente lite*, and awarding an injunction restraining the husband from incumbering or disposing of his property.
§ 1331. Decree for specific performance, striking out one plea in abatement, making up issue on another, and overruling plea in abatement, upon a submission of the issue to the court.
§ 1332. Order of the circuit court appointing receiver after an appeal to the supreme court of appeals, and during the pendency of such case on appeal.

No. 426.

§ 1294. Notice of lis pendens.

A——— B———
v.
C——— D———. } In Chancery.

Pending in the Circuit Court of the County of ——— and State of ———.

The object of the above entitled suit is to obtain a decree against the said C——— D——— in favor of the said A——— B——— upon a certain note held by the said A——— B——— against the said C——— D——— and to attach and sell the

following real estate in order to pay off and discharge said decree; which real estate is located on or near the waters of ——— in the district of ——— and the county and state aforesaid and contains about, as nearly as can be ascertained, ——— acres of land.

The name of the party or person whose estate in said land is intended to be affected by the foregoing suit is C——— D———.

A——— B———,
By Counsel.

This ——— day of ———, 19—.[1]

No. 427.

§ 1295. Exceptions to delivery bond taken by the officer levying an attachment.

[*After the style of the suit and the court in which it is pending.*]

Exceptions of the plaintiff made to the bond taken by the officer levying the attachment in this suit.

The plaintiff in the above entitled cause hereby excepts to the bond taken in this cause for the return of the property to the defendant, bearing date ——— day of ———, 19—, and which was returned by the officer to the clerk of the circuit court of ——— county, and state of ———, for the following reasons and upon the following grounds:

First. Because [*here set forth the reasons and grounds of the exceptions*].

Second. Because [*here set forth the further reasons and grounds of the exceptions*].

Third. Because [*here set forth the other reasons, if any, and continue in this way until all the grounds for exceptions to the bond are set forth*].

The plaintiff therefore, and for the reasons above given, hereby exceepts to the said bond and prays that his said exceep-

[1] The foregoing is taken from the statutes of W. Va. Code, 1913, c. 139, § 13.

tions may be sustained, and that the said officer be ruled to file a good bond with sufficient security to be approved by this court, on or before a day certain to be prescribed by this court.

A——— B———,
By Counsel.

C——— J——— L———,
Solicitor for the Plaintiff.[2]

No. 428.

§ 1296. Notice of motion under Virginia statutes to quash an attachment in vacation.

NOTICE.

A——— B———
v.
C——— D———. } In Chancery.

Pending in the Circuit Court in the County of ———, State of ———.

The plaintiff in the above entitled cause is hereby notified that the undersigned defendant therein will move the Honorable J——— S——— D———, judge of the said court in the vacation thereof at his chambers at ———, in the county and state aforesaid, on the ——— day of ———, 19—, to quash the attachment issued in the above entitled cause and levied upon the property of the said defendant as shown by the return on said attachment; that he will ask the said judge to hear testimony to be then and there introduced and otherwise show that said attachment was issued on false suggestions and without sufficient cause.

C——— D———,
By Counsel.

R——— K——— L———,
Solicitor for the Defendant.

[2] The foregoing form is predicated upon the provisions of the statutes of W. Va. Code, 1913, c. 106, § 11, and Va. Code, 1904, § 2973.

No. 429.

§ 1297. Affidavit to require plaintiff to elect whether she will proceed at law or in equity in one of two suits for the same cause, one pending in equity, the other at law.

State of ———,
County of ———, ss:

Mrs. F. E. N———
v. } In Chancery.
I. V. N——— and others.

Pending in the Circuit Court of ——— County, State of ———.

Before the undersigned authority this day personally appeared I. V. N———, who, after being by me first duly sworn, says that he is the I. V. N———, one of the defendants mentioned in the plaintiff's bill filed in the above entitled cause; and that the object of the above entitled suit is to obtain a decree of payment of two notes under seal, as in said bill mentioned and described.

This affiant further says that the said chancery suit against this defendant, as above stated, was brought on the ——— day of ———, 19—, and is still pending in the said circuit court undetermined.

This affiant further says that on the ——— day of ———, 19—, the said Mrs. F. E. N———, the same Mrs. F. E. N——— named as plaintiff in the said suit in chancery, brought her action at law against this defendant upon the same notes under seal as those upon which the said chancery suit above named is brought; that one of said notes is in the principal sum of $———, and bears date ———, ———, and the other of said notes is in the principal sum of $———, bearing date ———, ———, and each of which is signed by this affiant as the maker thereof; and that the said action at law brought as aforesaid on the ——— day of ———, 19—, is still pending in this court and undetermined.

Affiant further says that he is advised, and so states, that the plaintiff, Mrs. F. E. N———, can not proceed in separate suits for the same cause of action in a court of equity, and especially can she not proceed for the same cause in a court of law and in a court of equity at one and the same time, upon one and the same cause of action, as she is seeking to do here in the said circuit court against this affiant as the sole defendant in the said lawsuit, and as the principal defendant in the said chancery suit.

Affiant therefore asks that a rule be awarded returnable within a reasonable time to be prescribed by the said court, and served upon the said plaintiff, Mrs. F. E. N———, who is a non-resident of this state, in the manner provided by law, to show cause, if any she can, why she should not be required to elect whether she will prosecute and proceed to a final determination in the said chancery suit or in the said action at law, at her option, and that she be required to make such election before this defendant shall be put to the cost and inconvenience of making defense or pleading to both or either of said suits.

———.

Taken, sworn to and subscribed before me this the ——— day of ———, 19—.

———,

[*State when commission will expire.*] Notary Public.[3]

No. 430.

§ 1298. Order presenting affidavit and making motion to require plaintiff to elect whether she will proceed at law or in equity in one of two suits for the same cause, one pending in equity, the other at law.

Mrs. F. E. N———
v.
I. V. N——— and others. } In Chancery.

This day the defendant, I. V. N———, presented to the court his affidavit setting forth the pendency of an action at law in

[3] This form is based upon the case of Williamson v. Paxton, 18 Gratt. (Va.) 475.

this court by the said Mrs. F. E. N——— against him, the said I. V. N———, as the sole defendant therein, upon two notes under seal, one in the principal sum of $———. bearing date ———, ———, and the other in the principal sum of $———, bearing date ———, ———, and being the same identical notes upon which the said chancery suit is brought, and for which a decree is sought to be obtained in the said chancery cause against the said I. V. N———; and thereupon the said I. V. N——— moved the court for a rule against the said Mrs. F. E. N——— to be served on her, returnable at a time to be prescribed by the court, requiring her to show cause, if any she can, why she should not be required to elect as to which one of the said suits, whether the action at law, or this suit, she will prosecute, and in which she will proceed further.[4]

No. 431.

§ 1299. Of verdict on intervention in attachment.

[*After the style of the suit.*]

This cause came on again this day to be heard upon the papers formerly read herein; upon the former orders and decrees made and entered therein; upon the issue heretofore directed in this cause to be tried by a jury at the bar of the court and upon the verdict of the jury this day returned therein, in the words and figures following: "We, the jury, find that the petitioner, P——— H——— S———, has no lien upon the property, or any of it, levied upon by the sheriff of H——— county on the attachment sued out by W——— H——— S——— in this cause, against the estate of R——— L——— D———."[5]

[4] See note to § 1297.

[5] The foregoing form is taken from the case of Starke v. Scott, 78 Va., at p. 183.

No. 432.

§ 1300. Bill by committee of lunatic to sell lands of the latter, setting out specific bids made for the same.

[*After the caption and commencement.*]

I. Your orator was, on the ——— day of ———, 19—, by proceedings duly had before, and orders duly entered by, the ——— court of ———, in the said state of ———, duly appointed, and on that day duly qualified, as the committee of A——— R——— G———, who has been, since 19—, and still is, insane, and confined in the ——— hospital for the insane; that C——— L——— G———, a sister of the said lunatic, was first appointed her committee, and thereafter died; whereupon another sister, A——— M——— G———, qualified as her committee, who also thereafter died, when your orator was thereafter appointed, as above stated.

II. Your orator further says that one A——— B——— departed this life in the year ———, leaving a will, a copy of which is filed herewith, marked "Exhibit A," and made part hereof, whereby she, said testatrix, devised the residuum of her estate to her four nieces, of whom said A——— R——— G——— is one, as follows: [*here set out the clause referred to in said will*].

III. Your orator further says that by the said will the said A——— B——— devised to the said A——— R——— G——— the following parcels of land, situate in R———, in the state of ———, described as follows: [*here set out a brief description of the various parcels of land*].

IV. Your orator further says that the said lunatic has three sisters, C——— L———, A——— M——— and R——— C——— G———, who undertook to convey away the said several parcels of land, and that the same have been conveyed by regular chain of conveyances by them, and are now in the possession of the following persons: Lot No. 1, of W——— H——— P———; Lot No. 2, of E——— D——— T——— M———; Lot No. 3, of the R———, F——— & P——— & R——— & P——— R——— R——— C——— Company; Lot

No. 4, of W——— H——— P———; and Lot No. 5, of L——— L———.

V. Your orator further says that the foregoing is all of the property of every kind and character whatsoever belonging to the said lunatic.

VI. Your orator further says that the said W——— H——— P——— is willing to purchase the entire interest of the said lunatic in and to said Lot No. 1, and pay therefor the price of ——— dollars, the same to be in full satisfaction of all claims for past rents and profits, or otherwise; that the said E——— D——— T——— M——— is willing to purchase all of the interest of the said lunatic in Lot No. 2, at the price of ——— dollars; that the said R——— F——— and P——— & R——— & P——— R——— R——— C——— Company are willing to purchase all the interest of the said lunatic in Lot No. 3 at the price of ——— dollars; that the said W——— H——— P——— is willing to purchase all the interest of the said lunatic in Lot No. 4, at the price of ——— dollars; and that the said L——— L——— is willing to purchase all the interest of said lunatic in Lot No. 5, at the price of ——— dollars; but that the said several purchasers are willing to purchase said interest of said lunatic only in case they can obtain a good and perfect title to said land and premises, which they are advised can be done by suit of this character.

VII. Your orator further says that a sale of said lands and premises belonging to said lunatic would promote her interests at the prices and to the persons above named, for the following reasons: [*here set forth the facts showing it to be to the interest of said lunatic to sell the said land*].

VIII. Your orator further says that the rights of no person would be violated by a sale of said real estate; that O——— G———, one of the defendants hereto, is the only heir of the said lunatic in the event of the death of the said lunatic, he, the said O——— G———, her surviving.[6]

[6] The above form is taken from Palmer v. Garland, 81 Va. 444. The allegation that O——— G——— is the only heir of the said A———

IX. Your orator further says that the said parties propose to purchase the said lands, as to the payment of the purchase money, upon the following terms: [*here set forth the terms of purchase proposed as to each parcel of land, made by the respective purchasers*].

Your orator therefore prays that a guardian *ad litem* be appointed for the said lunatic; that the said guardian *ad litem* be required to answer this bill upon oath, and that the said lunatic may likewise be required to answer by her guardian *ad litem*, each of said answers to be duly verified; that said property may be sold to the parties above named upon the terms mentioned herein; and grant unto your orator such other, further and general relief as to equity may seem meet, and the nature of the case may require.

W——— L——— H———,
Committee of A——— R——— G———,
By Counsel.[7]

C——— E——— H———,
Solicitor.

[*Add the proper verification by oath of the plaintiff.*]

R——— G——— in case of the death of the latter, is adapted to the statute of Virginia. In West Virginia, it is necessary only to allege the names of the persons interested in the sale of the estate of persons under disability. W. Va. Code, 1913, c. 83, § 2.

[7] It will be observed that the above form sets out certain specific bids made by particular persons for specific parcels of the property of the lunatic. In the case of Palmer v. Garland, *supra*, the court referred the cause to a commissioner to ascertain and report whether it would be to the interest of the lunatic to confirm the offers of purchase set forth in the bill, at the prices therein named, and the terms set forth therein. The commissioner took the account in the usual way, after notice and a hearing of the parties, and reported that it would be to the interest of the lunatic to make and confirm the proposed sales to the persons, at the prices, and upon the terms alleged in the bill, and that the rights of no person or persons would be violated thereby. The court entered a proper decree in the case, confirming the report, directing the sales transferring the title to the property, and making all other necessary provisions for the investment of the proceeds of sale. The decree of the court was confirmed on appeal by the supreme court of appeals of the state.

No. 433.

§ 1301. Decree in divorce suit restoring plaintiff to maiden name.

[*After the style of the suit, and then as in No. 369 to the †, paragraph, and proceed as follows:*] And it appearing to the court that the maiden name of the said A——— B——— was A——— L———, and the said A——— B——— desiring it, upon her motion it is adjudged, ordered and decreed that she, the said A——— B———, be, and she is, hereby restored to her maiden name of A——— L———, by which she shall hereafter be called and known. [*Conclude by giving a judgment for costs in favor of the plaintiff.*]

No. 434.

§ 1302. Decree against personal representative of the estate of a decedent.

[*After the style of the cause and the proper recitals, proceed as follows:*] Upon consideration of all which the court is of opinion that the plaintiff is entitled to the relief prayed for in his bill against E——— F———, the administrator of the estate of C——— D———, deceased. It is therefore adjudged, ordered and decreed that the said A——— B——— do recover of and from the said E——— F———, administrator of the estate of C——— D———, deceased, to be paid out of the personal estate of said decedent, which shall or has come to the hands of the said E——— F———, administrator as aforesaid, the sum of ——— dollars, with legal interest thereon from this day until paid, and the costs of this suit.

[*Here add any other or further provisions to the decree that the nature of the case may warrant or the pleadings and papers in the cause may require.*][8]

[8] This form is based upon the provisions of the statute of West Virginia, Code, c. 131, § 20, and of Virginia, Code, 1904, § 2677.

No. 435.

§ 1303. Decree directing issue to determine question of fraud and mental incapacity.

[*After the style of the suit and the proper recital proceed as follows:*] Upon consideration whereof it is adjudged, ordered and decreed that the following issues be and they are hereby directed to be tried by a jury at the bar of this court, namely:

(1) Whether the deed bearing date on the ——— day of ———, signed and delivered by A——— B——— to C——— D———, was obtained by the defendants [*name them*], the grantees, by fraud or undue influence;

(2) Whether or not, at the time said deed was executed, the grantor was incapable, by reason of disease, old age, or other cause, of clearly understanding its purport and object.

And it is further adjudged, ordered and decreed that upon the trial of said issue, the said plaintiffs in this suit shall be the plaintiffs therein with the right to open and conclude the trial thereof; and that the defendants in this suit shall be the defendants upon the trial of said issues.[9]

No. 436.

§ 1304. Order dismissing bill for plaintiff's failure to give security for costs.

[*After the style of the suit.*]

This cause came on this day to be heard upon the suggestion on the record of this court, at a former term hereof, by the defendants, of the nonresidence of the plaintiffs, and upon the proof filed on behalf of the plaintiff, Adda Cannon, as to her residence in the state as well as the affidavits filed as proof by the defendants, as to her nonresidence. Upon consideration whereof the court is of opinion that the preponderance of proof

[9] The foregoing form is taken from the case of Fishburne v. Ferguson, 84 Va. 87, 4 S. E. 575.

is that the said Adda Cannon is a nonresident of this state, and that she is not a resident of the said state. And it not being proved in any way that any of the plaintiffs in this cause are residents of the state of West Virginia, and the plaintiffs not having given security for costs, as required by law, either before this court or the clerk thereof, within sixty days from the time of the said suggestion upon the records of this court, nor upon any day of this term, and the last day of this term of this court having arrived, it is adjudged, ordered and decreed that this suit be and the same is hereby dismissed, but without prejudice to the rights of the plaintiffs to institute another suit for the same cause of action. It is further adjudged, ordered and decreed that the defendants recover of the plaintiffs their costs about their suit in this behalf expended.[10]

No. 437.

§ 1305. Order for leave to file a bill of review.

[*After the style of the cause.*]

This cause came on this day to be heard upon the petition of C——— D———, the defendant, praying for leave to file a bill of review therein, and counsel for the respective parties having been heard, and the court being fully advised in the premises, doth hereby adjudge, order and decree that the said C——— D——— be at liberty to file a bill of review, touching the several matters in said petition mentioned and for relief in the premises as he may be advised.[11]

No. 438.

§ 1306. Caption for decree or order, with title of cause.

At a term of the circuit court° held in and for the county of ———, in the state of ———, at the court house thereof, on the ——— day of ———, 19—.

[10] The foregoing form is taken from the one used in Dean v. Cannon, 37 W. Va. 123, 16 S. E. 444.

[11] See Puterbaugh, Ch. Pl. and Pr. (3rd Ed.), 317.

Present: The Honorable J——— L——— K———, Judge of the said court.*

A——— B———
v. } In Chancery.
C——— D———.

This cause came on this day, etc.[12]

No. 439.

§ 1307. General form of an order.

[*After the style of the cause.*]

This cause came on this day to be heard upon the motion of the plaintiff [*or* defendant] for, etc., [*here insert the nature of the cause, and let the recital agree with the facts*]; the bill of complaint therein; the answer of the defendant therein; the replication of the complainant to said answer; the depositions taken and filed in the cause; and upon the argument of counsel for the respective parties therein.

Upon consideration whereof, it is adjudged, ordered and decreed [*here insert the order*].[13]

No. 440.

§ 1308. General form of a decree.

[*After the style of the cause.*]

This cause came on this day to be heard upon the bill of complaint filed therein; the answer of the defendant thereto; the replication of the plaintiff to said answer; upon the depositions taken and filed therein; and was argued by counsel.

[12] The above form is the one generally used in the entry of all decrees in chancery. The heading down to the * is made each day and the various orders are inserted thereafter until all the decrees that are rendered have been entered. After the first day the words "continued and" immediately after the ° are often inserted.

[13] The foregoing form is substantially taken from Puterbaugh, Ch. Pl. and Pr. (3rd Ed.), 256.

Upon consideration of all which it is hereby adjudged, ordered and decreed, that [*here insert the decree*].[14]

No. 441.

§ 1309. The recitals of a decree.

This cause came on this day to be heard upon the bill of complaint and its exhibits; the answer thereto, and the general replication to said answer; the depositions taken and filed in the cause on behalf of both plaintiff and defendant; and upon argument of counsel for the respective parties.

Upon consideration whereof, etc.[15]

No. 442.

§ 1310. Order for revival of suit.

[*After the style of the cause.*]

This cause came on this day to be heard, and it appearing to the court that on the ——— day of ———, 19—, the complainant exhibited his bill in this court, against C——— D——— and E——— D———, his wife, to be relieved touching the several matters therein contained; that the said C——— D——— and E——— D——— appeared and put in their answer to said bill, to which the complainant filed a replication; and that afterwards, on the ——— day of ———, 19—, the said cause came on to be heard in this court, when it was adjudged, ordered and decreed that, etc., [*here set out the decree*]; that before any further proceedings were had in said cause the said C——— D——— departed this life, having first duly made his will, therein appointing the said E——— D———, his wife, and the said E——— F———, executrix and executor, who duly proved the same; and that the said

[14] Puterbaugh, Ch. Pl. and Pr. (3rd Ed.), 256.

[15] The above form is constructed from one appearing in Puterbaugh, Ch. Pl. and Pr. (3rd Ed.), 253, and is the usual form found in works on chancery practice in which forms of this character appear.

E——— D——— has since also departed this life, leaving the defendant, E——— F———, her surviving, as the sole personal representative of the said C——— D———, deceased; and that the said suit and proceedings abated by the death of the said C——— D———; and that the complainant has exhibited his bill of revival in this court against the defendant, E——— F———; and that defendant, having been duly served with the process of summons of this court, more than thirty days prior to the present term, has failed to appear and put in his answer; it is ordered that the said suit and proceedings do stand revived against the said E——— F———, and be in the same plight and condition they were in at the time of the death of the said C——— D———.

No. 443.

§ 1311. Final decree for dissolution of partnership, and confirming report made in the cause.

[*After the style of the cause.*]

This cause having come on to be heard upon the bill of complaint herein, the answer of the defendant thereto, the replication of the complainant to such answer, and the report of the master in chancery of this court, to whom this cause was heretofore referred to take the proofs of the matters in issue in said cause, and to state an account of the partnership dealings between said parties, which said report is hereby approved and confirmed, and having been argued by counsel for the respective parties; and the court being fully advised in the premises, on consideration thereof, doth find: that the allegations of said bill are substantially true as therein stated; and that the equity of this cause is with the complainant; and that, etc., [*here insert any other matter found by the court*]; and that, upon the statement of the account between the said parties, in respect to their partnership dealings, there is now due from the defendant to the complainant the sum of ——— dollars.

It is therefore adjudged, ordered and decreed by the court that the copartnership heretofore existing between the said parties be, and the same is hereby, dissolved; that the defendant pay to the complainant within ——— days from this date, the said sum of ——— dollars, with lawful interest thereon from this date until paid, and also the costs of this suit to be taxed by the clerk of this court; and in default of such payment, that execution issue therefor.[16]

No. 444.

§ 1312. Order making petitioner party to the suit.

[*After the style of the cause.*]

This day came E——— F——— and presented his petition to the court, duly verified, praying to be made a party to this cause. And the court having examined and considered the said petition, and it appearing to the court that the said E——— F——— may properly be made a party thereto, it is therefore hereby adjudged, ordered and decreed that the said petition be filed in the papers of this cause, and that the said E——— F——— be made a party thereto, with full liberty to take such steps in the cause as he may be advised that his interests require. And it is further adjudged, ordered and decreed that the plaintiff's bill be so amended as to show that the said E——— F——— has been made a party to this cause, and properly brought into the suit for all purposes of the regular procedure herein, so far as the same may affect the said E——— F———.[17]

[16] The above form is taken from Puterbaugh, Ch. Pl. and Pr. (3rd Ed.), 414, 415.

After a decree for an accounting the plaintiff may always be ordered to pay the sum found due from him where the liability to pay is mutual. Clarke v. Tipping, 4 Beav. 588; Toulmin v. Reid, 14 Beav. 505; Stowell v. Cole, 2 Vern. 296; Horwood v. Schmedes, 12 Ves. Jr. 316; Stainton v. Carron Co., 24 Beav. 346.

[17] "The mere filing of a petition does not operate *proprio vigore* to make the petitioner a party. To effect this an order of the court is necessary." The Piedmont and Ar-

No. 445.

§ 1313. Decree for partition and dower, and appointing commissioners to assign dower and make partition in same case.

[*After the style of the suit and the proper recitals.*]

Upon consideration of all which the court doth adjudge, order and decree that the said complainant, A——— B———, widow of the said E——— B———, deceased, be endowed with one full, equal third part of the lands and premises in the bill and proceedings mentioned and described; that the said complainants, B——— B———, C——— B———, F——— B———, G——— B——— and H——— B———, are each entitled to one-fifth part of said premises in fee simple, subject to said dower; and the court doth further adjudge, order and decree that the said A——— B——— do recover her dower in the said premises, and that division and partition be made of the remainder thereof, after the assignment of said dower, between the said B——— B———, C——— B———, F——— B———, G——— B——— and H——— B———, in accordance with their respective interests therein; that B——— A———, D——— C——— and F——— E———, disinterested parties, be, and they are hereby, appointed commissioners to assign said dower and make partition of said premises, being first duly sworn for that purpose; and that, after having given reasonable notice to all of the parties to this suit of the time when they will proceed to assign said dower and make such partition, they do go upon said premises and first set off, allot, and assign to said A——— B——— her dower in said premises by metes and bounds, or other proper description, according to quality and quantity of said premises, giving her the homestead or dwelling-house on the homestead, if she shall so desire it, and may assign the whole of said dower in a body or out of two or more of the tracts in the bill and proceedings mentioned

lington Life Ins. Co. v. Maury, 75 Va. 508. See additional cases cited in previous sections of this work relating to parties and amendments.

and described, in such manner as they may deem best for all persons interested; and, secondly, after assigning the widow's dower as aforesaid, said commissioners are hereby directed and ordered to make partition and division of the remainder of said premises between the said B——— B———, C——— B———, F——— B———, G——— B——— and H——— B———, respectively, assigning to each one-fifth part thereof, by metes and bounds or other proper description, quality and quantity being considered, and if necessary, that they employ a surveyor with necessary assistance to aid them; and if said commissioners shall find that said premises are so circumstanced that dower can not be assigned, and a division and partition made thereof without manifest prejudice to the parties in interest, they will report such fact to the court, together with their reasons for so determining; and what the said commissioners shall do under this decree they shall report to the next term of this court. All of which is adjudged, ordered and decreed accordingly.[18]

No. 446.

§ 1314. Of exceptions to a deposition as an entirety.

A——— B———
v.
C——— D———. } In Chancery.

Pending in the circuit court of the county of ——— and state of ———.*

Exceptions of the plaintiff, A——— B———, to the deposition of R——— Q———, taken and filed on behalf of the defendant in the above named cause.

[18] The above form is adapted from one appearing in Puterbaugh, Ch. Pl. and Pr. (3rd Ed.), 532, 533. See Wamsley v. Mill Creek Coal and Lumber Co., 56 W. Va. 296, 49 S. E. 141; Robertson Consolidated Land Co. v. Paull, 63 W. Va. 249, 59 S. E. 1085; Brown v. Brown, 67 W. Va. 251, 67 S. E. 596, 28 L. R. A. (N.S.) 125.

The plaintiff excepts to the deposition of R——— Q——— taken and filed by the defendant in the above entitled cause on the ——— day of ———, 19—, and, as appears from the endorsement thereon made, filed with the clerk of the said court on the ——— day of ———, 19—, upon the following grounds:

First. Because the notice under which said deposition purports to have been taken, does not specify the month, or day of the month, upon which said deposition was to be taken [*or whatever the grounds may be*].

Second. Because [*if there be further ground of objection to said deposition, here state it and continue to specify all other objections, properly numbering them, which the plaintiff desires to urge against the said deposition*].

The plaintiff therefore excepts to the foregoing deposition of R——— Q——— and prays that the same may not be read nor considered upon the hearing of said cause.

A——— B———,
By Counsel.

S——— E——— H———,
Solicitor.

No. 447.

§ 1315. Of exceptions to certain parts of a deposition.

[*As in No. 446 to the *, then proceed as follows:*] Exceptions of A——— B———, the above named plaintiff, to certain parts of the deposition of R——— Q——— taken and filed in the above named cause by the defendant.

The plaintiff excepts to the following portions or parts of the deposition of R——— Q——— taken by the defendant in said cause on the ——— day of ———, 19—, and filed in the clerk's office in said court, as appears from the endorsement made on said deposition, on the ——— day of ———, 19—:

First. To question No. 1 and the answer thereto given because the question calls for hearsay evidence and the answer contains the mere declaration of the defendant made in the

absence of the plaintiff [*or whatever the ground of objection may be, setting it out specifically*].

Second. To question No. 5 and the answer thereto because [*here specify the grounds of objections*].

Third. To so much of the answer to question No. 15 as [*here set out specifically the objectionable part of the answer, and proceed in this manner until all the objectionable parts of the deposition are pointed out*].

The plaintiff therefore excepts to so much and such parts of said deposition as are hereinabove specified, and prays that his exceptions may be sustained; and that those parts of said deposition so excepted to may not be read nor considered by the court upon the hearing of the above named cause.

A——— B———,
By Counsel.

C. E. H.,
Solicitor.

No. 448.

§ 1316. Of injunction bond.

Know all men by these presents: That we, A——— B——— and E——— F———, are held and firmly bound unto the state of West Virginia, in the just and full sum of ——— dollars; the payment whereof well and truly to make, we bind ourselves jointly and severally, firmly by these presents.

Witness our hands and seals this the ——— day of ———, 19—.

The condition of the above obligation is such that, whereas the above bound A——— B——— hath obtained an injunction against C——— D——— in a suit in equity, now pending in the circuit court of the county of ——— and state aforesaid, inhibiting * and restraining him, the said C——— D——— [*here set forth in a general way the acts enjoined*]. Now, therefore, if the said A——— B——— shall well and truly pay all such costs as shall be awarded against him and also such damages as shall be incurred or sustained by the said

C——— D——— by reason of the suing out of the said injunction, in case the same shall be hereafter dissolved, then the above obligation to be void, else to remain in full force and effect.†

———. [*Seal.*]

———. [*Seal.*]

No. 449.

§ 1317. Of bond of injunction to judgment at law.

[*As in No. 448 to the *, then as follows:*] and restraining C——— D——— from further proceeding, or attempting to proceed further, to enforce the payment or collection of a certain judgment in favor of the said C——— D——— rendered by the circuit court of the county of ———, and state aforesaid, on the ——— day of ———, 19—, against the said A——— B———, until the further order of the court; now, therefore, if the above bound A——— B——— shall pay the above named judgment and all such costs as may be awarded against the said A——— B———, and also such damages as shall be incurred or sustained by the said C——— D———, by reason of the suing out of the said injunction, in case the same shall be hereafter dissolved, then this obligation to be void, else to remain in full force and effect. [*Conclude from the † as in No. 448.*]

No. 450.

§ 1318. Of order removing cause to another county because improper for judge to preside at the trial.

[*After the style of the cause.*]

This being a cause, in the judgment of the court, in which the judge of this court is so situated as to render it improper for him to decide the same or preside at the trial thereof, it is therefore adjudged, ordered and decreed that this cause be removed to the county of ——— to be heard there and finally determined; and the clerk of this court is hereby directed as

soon after the adjournment of this court as he may conveniently do so, to transmit the original papers thereof, with copies of all rules and orders therein made and entered, and a statement of the costs incurred by each of the parties thereto, to the clerk of the circuit court of the said county of ———.[19]

No. 451.

§ 1319. Order awarding injunction restraining and inhibiting laborers and members of labor organizations from molesting the plaintiff in the conduct of his business.

[*After the style of the cause.*]

This day the M——— C——— Company, a corporation, by its counsel, presented to the undersigned judge of the circuit court of ——— county, in the vacation of the court, its bill for an injunction, duly verified, alleging, among other things, that the defendants named in its bill are about to prevent the employes of the plaintiff from mining and producing coal in and from its mines, and performing other labor in and about its mines, and that unless the undersigned judge shall grant an immediate restraining order preventing them from interfering with the employes of the plaintiff and the conduct of the plaintiff's business, there is great danger of irreparable injury and damage to the plaintiff, inasmuch as the defendants are insolvent, and wholly irresponsible to respond in damages obtainable in an action at law.

Upon consideration whereof, an injunction is hereby awarded, restraining and inhibiting the defendants, to-wit: [*naming them*], their confederates, and all others associated with them, from unlawfully interfering with the plaintiff's employes now in its employment, at or upon the plaintiff's premises, and from

[19] The foregoing form is adapted to the statute of W. Va. Code, c. 128, §§ 1, 2.

unlawfully interfering with any person in or upon its premises, who may desire to enter its employment hereafter, by the use of threats of personal violence, or intimidation, or coercion, or by any other means whatsoever, calculated to intimidate, terrorize or alarm or place in fear, any of the employes of the plaintiff in any manner whatsoever, at or upon its premises.

And the said defendants and all other persons associated with them are hereby enjoined from undertaking, by any of the means or agencies mentioned in the plaintiff's bill, to go upon the plaintiff's land or premises to induce or cause any of the employes of the plaintiff, by means of threats or intimidation of any sort, to quit or abandon the work in the mines of the plaintiff or its premises set forth and described in its bill; and said defendants and their associates are hereby enjoined from congregating in, on or about the premises of the plaintiff for the purpose of inducing the employes of the plaintiff, by unlawful means or methods, now working in said mines, to quit and abandon their work.

And the said defendants, their confederates and associates, are further restrained from conducting or leading any body or bodies of men up to or upon the premises of the plaintiff in the manner set forth in the plaintiff's bill, for the purpose of inducing and causing the plaintiff's employes to quit and abandon their work for the plaintiff, and from in any manner interfering with, directing or controlling plaintiff's employes, or from interfering in the business of the plaintiff upon its land or premises, as in said plaintiff's bill is set forth and alleged.

And the said defendants, their confederates and associates, are hereby enjoined from going upon any part of the plaintiff's land or premises, for the purpose of intimidating, coercing or endeavoring, by any unlawful means, to procure and induce the plaintiff's employes to cease their work in its mines and upon its premises.

The foregoing injunction shall not take effect until the plaintiff, or someone for it and on its behalf, shall enter into bond with approved security before the clerk of said circuit court,

in the penalty of ——— dollars, conditioned to pay all costs and damages which may be incurred or sustained by the said defendants or any of them by reason of the issuance of this injunction, should the same be hereafter dissolved.

———,
Judge of the Circuit Court of ——— County, and State of ———.

The clerk of the circuit court of the county of ———, and state of ———, will enter the foregoing as a vacation order, as of the ——— day of ———, 19—. ———,
Judge.[20]

No. 452.

§ 1320. Form of petition for an attachment for disobeying an injunction.

[*As in No. 185 mutatis mutandis to the* *.]

A. B. Complains against C. B. and says that she is the wife of said C. B., and on the ——— day of ———, 19—, she caused to be filed, in the office of the clerk of said court for said county, her bill praying for a divorce from said C. B. and for other relief for the causes therein set forth; and upon her motion a writ of injunction was duly issued by said court on the ——— day of ———, 19—, enjoining and prohibiting said C. B. from imposing any restraint upon her personal liberty during the pendency of said bill, and was duly served upon said C. B. on the ——— day of ———, 19—.

Yet the said C. B., well knowing the premises, but wholly regardless of the said injunction, on, etc., at, etc., with force and arms, made an assault upon said A. B. and beat and bruised her, and imprisoned and deprived her of her personal liberty for the space of ——— days, from said, etc., to, etc., in contempt of said injunction, and against the peace and dignity of the state.

[20] The above form is based upon the decisions and principles therein announced appearing in the note to form No. 138, § 992.

Wherefore she prays that said C. B. may be held to answer for said contempt and that justice may be done in the premises.

[*Verify the above by affidavit.*] A. B.[21]

[21] The above form is taken from Fletcher, Eq. Pl. and Pr., 555, which is the form prescribed by the rules of the supreme court of New Hampshire, as stated by the author citing 56 N. H. 620.

"When an injunction has been granted, as in this instance, in a suit between individuals to protect one of the parties in the enjoyment of some private right, immunity or franchise, it seems to be the rule that no one can complain of a violation of the same, unless it be someone who has a present interest in maintaining the injunction, or unless he was a party to the suit in which the order was obtained, or for some reason stands in privity with one who was a party to the litigation. In cases where an injunction has been granted to enforce or maintain a merely private right, a proceeding instituted to punish a party for violating the order is very generally regarded as a proceeding to redress a private injury in which the public have no concern, and for that reason the prosecutor or person filing the information must have an interest in the proceedings differing from that of the general public; otherwise the courts will not entertain the information. *Howley* v. *Bennett*, 4 Paige 163; Rap., Contempt, § 127; 2 High, Inj. (2nd Ed.), § 1449. The cases show that a party in whose favor an injunction has been awarded may by express agreement, or by his conduct, release the injunction, or at least waive his right to have the particular acts done in violation of the restraining order adjudged to be a contempt. *Mills* v. *Cobby*, 1 Mer. 3; *Barfield* v. *Nicholson*, 2 Law. J. Ch. 90; *Hull* v. *Harris*, 45 Conn. 544; 2 High, Inj. (2nd Ed.), § 1450. It would seem to follow that an injunction obtained to protect a merely private right, is so far within the control of the party obtaining it, and is so far a matter of individual concern, that only those persons who have a present interest in the right to be protected, can be heard to complain of its violation. If a person in whose favor an injunction has been granted complains of its violation, a presumption should no doubt be indulged that he still has an interest in the subject matter to which the injunction relates, without any averment to that effect; and if such interest is called in question by the respondent, the court ought not to inquire very particularly as to the extent of the prosecutor's interest, further than to assure itself that the prosecutor is not a mere intermeddler. * * * Nevertheless it is essential that the person who sets on foot a prosecution for contempt should have some present interest in enforcing obedience to the order which has been violated." Secor v. Singleton, 35 Fed. 376, 377, 378. To the same effect and holding to the same doctrine are the following cases: Hunter v. Phillips, 56 Ga. 634; Hackett v. Green, 32 Ga. 512; People v. Diedrich, 141 Ill. 655, 30 N. E. 1038; Latimer v. Barmore, 81 Mich. 592, 46 N. W. 1; Moore v. Mercer Wire Co. (N. J. Ch.), 15 Atl. 305.

In Diedrich v. People, *supra*, the court decides: "An injunction obtained to protect a merely private

No. 453.

§ 1321. Form of order to show cause why an attachment should not issue for disobeying an injunction order.

A——— B———. Plaintiff,
v.
C——— D———, Defendant. } In Chancery.

And now, this day, the petition, duly verified, of said A. B. having been filed in this court, in the above entitled cause, and it appearing to the court by the said petition and affidavit thereto attached that the said C. D. has disobeyed the injunction order in this cause, duly served upon him, inhibiting and restraining him [*here set forth the matters enjoined, and also state wherein the defendant has not obeyed the injunction order*], it is therefore ordered that the said C. D. be required to be and appear before this court on the ——— day of ———, 19—, and then and there to show cause why he should not be adjudged to answer for contempt to the court in disobeying the lawful process of this court as above mentioned duly served upon him.

It is further ordered that a duly attested copy of this order be forthwith served upon the said C. D.[22]

No. 454.

§ 1322. Form of an answer to a rule to show cause why a party should not be attached for contempt.

A——— B———
v.
C——— D———, E——— F———,
and G——— H———. } In Chancery.

Pending in the circuit court of the county of ———, in the state of ———.

right is so far within the control of the party obtaining it, and a matter of individual concern, that only those persons who have a present interest in the right to be protected, can institute contempt proceedings to punish its violation."

[22] This form is based upon a similar one appearing in Fletcher, Eq. Pl. and Pr., 558, and is taken substantially from State v. Bourne, 21 Or. 225, 27 Pac. 1048.

And now comes C. D., one of the above named respondents, in obedience to the rule heretofore, to-wit, on the ——— day of ———, A. D. 19—, entered in said court, requiring this respondent and E. F. to show cause why an attachment should not issue against them for a contempt of said court, on account of the matters and things in a certain information filed in said court, in said rule mentioned; and in answer to the said rule this respondent says that he is the sole proprietor of the said newspaper mentioned in the said information, called the ———, and that the article set forth in said information was published therein on the ——— day of ———, 19—, but this respondent says that neither before nor at the time of the publication had he any knowledge or information relative to the same. This respondent did not know before said paper in which the article appeared was published that said article, or any article upon the subject, was written or to be written, or that any article upon the subject was to be published and he neither advised nor counseled, nor was he advised or counseled with by any person whatever, relative to the publication of said article, or any article upon the subject.

This respondent further says that the first knowledge or information he had relative to said article or its publication was when he read the said article in said paper after its publication and distribution.

This respondent further says that he is informed and believes that no disrespect was intended by said article to said court, nor to any judge thereof, and that a fair construction thereof will not warrant an inference to that effect.

This respondent is advised and believes that the publication of said article was not designed and had no tendency to impede, embarrass or obstruct the administration of justice in said court. And this respondent does and will insist that he had and still has the right, through his said paper, by himself or his agents, to examine the proceedings of any and every department of the government of this state, and that he is not responsible for the truth of such publications, nor for the motives with which they were or are made, by the summary process of an attachment for contempt, save when such publica-

tions impede, embarrass, or obstruct the administration of justice.

This respondent further says that such has been the established law of this state for over thirty years last past, and that said court has no judicial power to change the same.

This respondent takes this occasion to renew his repeated expressions of confidence in the ability and integrity of said court, and of the individual members of the same, and as evidence of the same gives the following article, which was published in said paper, issued on the ——— day of ———, 19—; that is to say [*here insert the article*].

This respondent further says that, at the time of the publication of said article first mentioned, there was an intense excitement in the community, and particularly in the city of ———, on account of the frequent murders, and the escape of the perpetrators thereof; and this respondent is informed and believes that the design of said article was to impress upon the community the importance of electing members of the next general assembly of this state who would remedy the defects in the criminal law of the state, by which criminals are able to escape punishment, and not to reflect upon the ability or integrity of said court, or any member thereof, nor to impede, embarrass, or obstruct the administration of justice.

Wherefore, this respondent prays that the said rule, as against him, may be discharged.

A——— B———.

[*Append the affidavit for the verification of a pleading.*][23]

No. 455.

§ 1323. Form of an order dismissing suit agreed.

A——— B———
v.
C——— D———. } In Chancery.

This day came the parties to this cause by their attorneys, and thereupon the same is hereby dismissed "agreed."[24]

[23] The above form will be found in the case of The People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528.

[24] In Pethel v. McCullough, 49 W. Va. 520, 39 S. E. 199, it is decided that an order dismissing a case agreed is a bar to another suit for the same cause of action.

No. 456.

§ 1324. Form of an order requiring plaintiff to elect whether he will proceed at law or in equity.

[*After the style of the cause.*]

It appearing that the complainant prosecutes the defendant both at law and in this court for one and the same matter, whereby he is doubly vexed, thereupon, on motion of O. R., solicitor, for the defendant, it is ordered that the complainant, within ——— days after the notice of this order, elect whether he will proceed at law in the suit brought by him against the defendant, or in this court, upon his bill; and if he elects to proceed at law, or if he neglects to file such election within the said ——— days, the bill in this cause shall thereupon stand dismissed, with costs; and, if he elects to proceed here, it is then ordered that he proceed no further in the suit at law without leave of this court.[25]

No. 457.

§ 1325. Form of instrument making election to proceed in equity when action at law and suit in equity pending for same cause.

A——— B———
v.
C——— D———. } In Chancery.

Pending in the circuit court of ——— county and state of ———.*

In pursuance of an order of this court, made in this cause, and dated the ——— day of ———, 19—, the complainant doth hereby make his election to proceed in this court.

C. R.,
Solicitor for Complainant.[26]

Dated, ———.

[25] See 1 Hofman, Ch. Pr., 87, cited in Fletcher, Eq. Pl. & Pr., 392. See also, *ante*, § 1297; Williamson v. Paxton, 18 Gratt. (Va.) 475.

[26] The above form is taken from Fletcher, Eq. Pl. and Pr., 292.

No. 458.

§ 1326. Short form of decree on an issue out of chancery entered upon the verdict of the jury.

[*After the title of the cause.*]

This cause came on this day further to be heard upon the bill and answer, and replication thereto, the depositions of witnesses, and the verdict of the jury upon the issue out of chancery in this cause, and was argued by counsel. On consideration whereof, the said verdict is approved and confirmed. The court doth adjudge, order and decree, etc.[27]

No. 459.

§ 1327. Caption of depositions, examination of witnesses, adjournment, and attestation.

The depositions of A. B. and others, taken before me, W. B. M., a notary public [*or* justice of the peace], for the county of ——— and state of ———, pursuant to notice hereto annexed, at the office of J. H., in the city [*or* town] of ———, in the county of ———, state of ———, on the ——— day of ———, 19—, between the hours of 9 a. m. and 4 p. m., to be read as evidence on behalf of J. M. M., in a certain suit in equity, pending in the circuit court for the county of ———, state of ———, wherein P. S. is plaintiff, and the said J. M. M. is defendant.

Present: C. D., counsel for plaintiff; E. F., counsel for defendant.

A. B., being first duly sworn, deposeth and saith as follows:

Ques. 1. State your age, residence and occupation.

Ans.

Ques. 2. Are you acquainted with the parties to this suit?

Ans.

[27] See Ogle v. Adams, 12 W. Va. 224, from which this form is taken.

[*Proceed with the deposition as indicated above, numbering the questions in consecutive order, until the examination in chief is concluded.*]

CROSS-EXAMINATION.

Ques. 1. [*Continue as in the examination until the cross-examination is finished.*]

RE-EXAMINATION.

Ques. 1. [*Proceed as in the examination in chief until the re-examination is finished.*]

And further this deponent saith not.

(*Signed*) A. B.

No other witness appearing, the further taking of these depositions is continued until tomorrow, at the same place and between the same hours. J W. C.,
Notary Public.

Office of J. H., in the city [*or* town] of ———,
——— day of ———, 19—.

Present: C. D., counsel for plaintiff; E. F., counsel for defendant.

O. P., being first duly sworn, deposeth and saith as follows:

Ques. 1. [*Proceed as in the taking of the deposition of A. B.*]

And further this deponent saith not. O. P.

State of ———,

County of ———, to-wit:

I, J. W. C., a notary public within and for the county and state aforesaid, do hereby certify that the foregoing depositions of A. B. and O. P. were duly taken, sworn to and subscribed before me, at the times and place and for the purpose specified in the caption hereto.

Given under my hand this ——— day of ———, 19—.

J. W. C., Notary Public.[28]

[28] See Matthews, Forms, 301, 302. When the depositions are taken in stenographic characters, in pursuance of the statute, the form of the certificate may easily be varied to meet the requirements of the statute. See W. Va. Code, 1913, c. 130, § 33.

No. 460.

§ 1328. Form of affidavit authorizing an order of publication against a corporation which has failed to comply with section 24, chapter 54, of the Code of West Virginia.

State of West Virginia,
County of ———, ss.

Before the undersigned authority, this day personally appeared C——— E——— H———, who, after being duly sworn, says that he is the attorney for the plaintiff in the case of D——— S——— B———, plaintiff, against the O——— R——— R——— Company, a corporation, and the B——— & O——— R——— Company, a corporation, defendants, pending in the circuit court of the county and state aforesaid.

Affiant further says that there is no person that can be found in the county of ——— upon whom to serve process as to the said O——— R——— R——— Company, a corporation. This affiant further says that there is no person now residing in the state of West Virginia who has been appointed under the provisions of the statute of West Virginia, section 24 of chapter 54 of the Code, to accept service of process or notice on behalf of said O——— R——— R——— Company, a corporation, and upon whom service of any process or notice may be had or made as to the said O——— R——— R——— Company, a corporation; and this affiant says that the said O——— R——— R——— Company under and by virtue of the statute of West Virginia, section 24, chapter 54, of the Code, with which the said O——— R——— R——— Company has failed to comply, as hereinbefore stated, and by reason of such noncompliance therewith, affiant is advised and so states, may be proceeded against as a nonresident of the state of West Virginia.

———.

Taken, sworn to and subscribed before me, this, the ——— day of ———, 19—.

No. 461.

§ 1329. Form of order of publication where corporation has failed to comply with section 24, chapter 54, of the Code of West Virginia.

State of West Virginia.

At rules held in the clerk's office of the circuit court of the county of ———, beginning on Monday, the ——— day of ———, 19—, the following order was entered:

D——— S——— B———

v.

O——— R——— R——— Company, a corporation, and the B——— & O——— Company, a corporation. } In Chancery.

The object of the above entitled cause is [*here state the object of the suit*].

It appearing by affidavit filed in the above entitled cause that the O——— R——— R——— Company is a corporation, and that there can be no person found in the county of ——— upon whom to serve process relating to the said O——— R——— R——— Company; and it further appearing from affidavit filed therein that there is no person now residing in the state of West Virginia who has been appointed under the provisions of the statute of West Virginia, section 24, chapter 54, of the Code, to accept service on behalf of said O——— R——— R——— Company, a corporation, and upon whom service of any process or notice may be had or made as to the said O——— R——— R——— Company, a corporation; and it further appearing from affidavit filed in the above entitled cause that the said B——— & O——— R——— Company is a nonresident of the state of West Virginia, it is ordered that the said O——— R——— R——— Company and the said B——— & O——— R——— Company do appear here within one month from the date of the first publication hereof and do what is necessary to protect their interests.

A copy.

Teste: R——— E——— M———,
Clerk.

No. 462.

§ 1330. Form of order made in vacation directing the payment of alimony, pendente lite, and awarding an injunction restraining the husband from incumbering or disposing of his property.

An entry made in the circuit court clerk's office of M——— county, W——— V——— in vacation, on Monday, the ——— day of ———, 19—.

C——— B——— C———
v. } In Chancery.
R——— C———.

Pending in the circuit court of M——— county, W——— V———.

This day C——— B——— C———, by her solicitor, presented her bill in this cause, duly verified by her own affidavit and moved the undersigned, judge of the circuit court of said county and state, in the vacation of the said court, to require the defendant in the above entitled cause to pay to the said C——— B——— C——— a reasonable sum of money for her support and maintenance, during the pendency of said suit, and to enable her to carry on and prosecute the same. And the said judge having read and considered said bill, it is therefore adjudged, ordered and decreed that the said R——— C——— do pay unto the said C——— B——— C———, within ten days from the time a copy of this order shall be served upon him, the sum of ——— dollars, for the purpose of her maintenance and support during the pendency of this suit, and to enable her properly to carry on the same.

And on the further motion of the said C——— B——— C———, an injunction is hereby awarded inhibiting and restraining the said R——— C——— from disposing of or incumbering his real estate in the said bill and proceedings mentioned and described, consisting of a house and lot in L———, M——— county, W——— V———, the house containing five rooms, and now occupied by the said R———

C———, and also from disposing of or incumbering the ——— acres of land situated about ——— miles back of L———, in the county of M———, and state of West Virginia, except that he is hereby permitted, if necessary, to incumber the said property to the extent of enabling him to raise the said sum of ——— dollars; all of which is adjudged, ordered and decreed accordingly.

And it appearing to the court that the above named C——— B——— C——— is the wife of the defendant, and is without any means whatever, and it further appearing to the satisfaction of the court that this is a case in which bond should not be required, the foregoing injunction is awarded to take effect without bond.

And in lieu of formal notice the clerk of the said court is hereby directed to make two copies of this order, one to be served forthwith upon the said R——— C——— and the other to be returned by the sheriff of said county to said clerk's office, containing an endorsement of the time and manner of the service thereof.

F——— A——— G———,
Judge of the Circuit Court of M——— County,
W——— V———.

The clerk of said court will enter the foregoing in the chancery record as a vacation order, as of the ——— day of ———, 19—. F——— A——— G———.

No. 463.

§ 1331. Decree for specific performance, striking out one plea in abatement, making up issue on another, and overruling plea in abatement, upon a submission of the issue to the court.

C——— D———.
v.
A——— B——— } In Chancery.

This cause came on this day to be heard upon the process duly executed upon the defendant; upon the plaintiff's bill

with its exhibits, regularly filed at rules, and the proceedings regularly had thereon at rules; upon the special pleas in writing filed by the defendant at rules, marked respectively Nos. 1 and 2; upon the motion of the plaintiff to strike out plea No. 1 from the record and files of this cause; upon the general replication of the plaintiff to said plea No. 2; upon the waiver in writing of a jury for the trial of the issue made upon the replication to said special plea No. 2, and the submission of the trial of said issue by like agreement to the court in lieu of a jury; upon the answer of the defendant to said bill and a general replication to said answer; upon the depositions taken and filed in the cause on behalf of the plaintiff and defendant; and upon the argument of counsel.

Upon consideration of all which the court is of opinion to and doth hereby sustain plaintiff's said motion to strike said plea No. 1 from the record and files of this cause. It is, therefore, adjudged, ordered and decreed that said special plea No. 1 be and the same is hereby stricken from the record and files of this cause. And the court is further of opinion and doth find for the plaintiff on the issue made by the plaintiff's general replication to said plea No. 2, filed in this cause as aforesaid. The court is, therefore, of opinion, and doth so adjudge, order and decree, that the allegations in said plea No. 2 contained are, in fact, not true; and this court is further of opinion, and doth so adjudge, order and decree, that said special plea No. 2 be and the same is hereby overruled, and is of opinion, and doth so adjudge, order and decree, that this court hath jurisdiction to hear and determine this cause. And it appearing from the pleadings and proofs in this cause that the defendant, C——— D———, by his agent duly authorized thereto, entered into a contract with the plaintiff, A——— B———, whereby he did agree to purchase from the said A——— B——— the lands in the bill and proceedings mentioned and described, at the contract price of ——— dollars; and it appearing from said bill that said C——— D——— has declined and refused, and still declines and refuses, to perform

his part of said agreement by taking the said land and paying therefor the said sum of ——— dollars; and it further appearing to the court that the said agreement ought to be specifically enforced; it is, therefore, adjudged, ordered and decreed that said agreement between said plaintiff and defendant, whereby said plaintiff did agree to sell to the defendant the land in the bill and proceedings mentioned and described, containing ——— acres, and which the said defendant agreed to purchase from the said plaintiff at the sum of ——— dollars, be, and the same is hereby, enforced.

It is, therefore, adjudged, ordered and decreed that the defendant do pay to the plaintiff the said sum of ——— dollars, with legal interest thereon from this date until paid, and the costs of this suit. And it is further adjudged, ordered and decreed that, upon the payment of the said sum of ——— dollars, and interest thereon, and costs of this suit, said A——— B——— do make, acknowledge and deliver to the said C——— D——— a deed with covenants of general warranty conveying to him, the said C——— D———, the title in and to the said tract of land containing ——— acres, and fully set out and described in the plaintiff's said bill; and in default thereof, then N——— G——— is hereby appointed and empowered and directed to make, acknowledge and deliver said deed for and on behalf of the said A——— B——— to the said C——— D———, conveying to him, the said C——— D———, the said land, with covenants of general warranty, for which said N——— G——— shall be allowed the sum of ——— dollars, to be paid by the said A——— B———, and to be taxed as costs against said A——— B———. And thereupon said A——— B——— asked leave to file such deed at this time in the papers of this cause, duly executed and acknowledged by said A——— B——— and his wife, and bearing date on the ——— day of ———, 19—, to be delivered to the said C——— D——— by the clerk of this court upon the payment by the said C——— D——— of the said sum of ——— dollars, with the interest accrued thereon, and the costs aforesaid; which deed is hereby accordingly filed among the papers of this cause, to be deliv-

ered to the said C——— D——— by the clerk of this court upon the payment to the said A——— B——— of the said money, interest and costs aforesaid, which payment shall be evidenced by the receipt of the said A——— B——— of the payment of the said money, or his release of this decree duly signed and acknowledged.

All of which is adjudged, ordered and decreed accordingly.

No. 464.

§ 1332. Order of the circuit court appointing receiver after an appeal to the supreme court of appeals, and during the pendency of such case on appeal.

[*After the style of the cause.*]

On petition of C——— M——— E——— to have a receiver appointed to take charge of the land in the bill and proceedings in this cause mentioned and described, and to rent the same out during the pendency of the appeal taken from the decree of this court rendered on the ——— day of ———, 19—, the parties were fully heard, by counsel; upon consideration whereof the court doth hereby appoint J——— W——— O———, sheriff of this county, as such receiver, and doth adjudge, order and decree that said O——— do take charge of said land and rent the same for this year, and also from year to year, during the pendency of said appeal; that he take bond with good security for the rent of each year, payable on the ——— day of ———, of each year, and, if not paid, that he take the necessary legal steps to collect the same; and when collected he shall hold the same subject to the further order of this court. And what the said O——— shall do as such receiver under and by virtue of this order, he shall report to this court at a future term.[29]

[29] It will be observed that the receiver appointed by the above order is the sheriff of the county, so that bond is not required of him, his official bond covering a duty of this sort.

The foregoing form is taken from the one approved by the court of appeals of Virginia in the case of Adkins v. Edwards, 83 Va. 316, 2 S. E. 439.

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